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THE LAW OF LEGISLATIVE POWER IN CANADA

BY

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Hon. Mr. Justice Henry Fraser



TORONTO:
THE TORONTO LAW BOOK AND PUBLISHING COMPANY, LIMITED.
1897-8.

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TO THE MEMORY OF

SIR JOHN BEVERLEY ROBINSON, Bart.,

FORMERLY CHIEF JUSTICE OF UPPER CANADA

THIS WORK IS DEDICATED

ALBEIT AN UNWORTHY TRIBUTE

BY HIS GRANDSON

THE AUTHOR.

PREFACE.

The primary aim I have had in view in writing this book has been to extract from the reported decisions on the British North America Act all that is to be found therein of general application upon the law governing the distribution of legislative power between the Dominion parliament and the various provincial legislatures of Canada, to formulate the results so arrived at in general Propositions, and to point out in the notes thereto the authorities upon which these Propositions respectively rest, all decisions and dicta which illustrate them, and any which are, or appear to be, at variance with them. I have, however, freely resorted also to reports of Ministers of Justice, and other State documents, the verbatim reports of arguments before the Judicial Committee of the Privy Council, and all other sources from which can be derived suggestion or illustration upon the subject dealt with. In this way I have endeavoured to set forth, in ordered form, and as concisely as possible without sacri-

ficing completeness, the whole of the law of legislative power in Canada in its present stage of development, and in connection therewith the relation of the Crown to the Canadian legislatures. This method of arrangement under general Propositions is, I think, better suited to the complete and systematic treatment and study of this branch of the law, than any arrangement under the various sections of the British North America Act can possibly be, while, by numerous tables, and a complete general index, I have endeavoured to make the contents of these pages thoroughly accessible for purposes of reference.

In an introductory chapter I have endeavoured to prove that, Professor Dicey notwithstanding, the preamble of the British North America Act states the truth in asserting that Canada is federally united with a Constitution similar in principle to that of the United Kingdom, and have compared the distribution of legislative power between Congress and the States under the United States Constitution, with that between the Dominion parliament and the provincial legislatures,

with a view to showing how much, or, as it results, how little help we may hope to derive in the solution of our own problems from the American decisions.

In regard to the order of the general Propositions, it will be found that those have been placed first which relate to the British North America Act as a whole, then come those relating to the Crown, then those relating alike to the Dominion parliament and the provincial legislatures, then those relating especially to the Dominion parliament, and, lastly, those relating especially to the provincial legislatures.

Practical necessities have required the printing off of small sections of this book as the same were completed and placed in type. The printing, however, was stopped at the point where it was foreseen that the judgment of the Privy Council on the Liquor Prohibition Appeal, 1895, would have an important bearing, and not continued until after that judgment had been given, so that its contents might be fully embodied in the text.[1] For the rest the Privy Council decisions given during the

[1] See *infra* p. 393, n. 1.

period occupied in passing through the press—the Virgo case, the Indian Claims' case, the Brewers' and Maltsters' Association case, and Fielding *v.* Thomas—have appeared at periods most convenient for their inclusion in this work; and, generally, it may be said that the current of judicial decision during the period of printing has in no way materially affected the text.[1] However, a table of Addenda will be found which gives some supplemental citations, but the main object of which is more thoroughly to collate all portions of the text.

I would add here that this book, such as it is, would almost certainly never have been written had it not been for the four volumes of Mr. Cartwright's collection of cases under the British North America Act, published by arrangement between the Dominion and Ontario Governments. Such collections enable a man of small means to have in his own library at little cost a great part, perhaps the bulk, of the material with which he has to deal, and to pursue his labours uninterruptedly in the evenings, when alone, it may well

[1] The only exception to this statement is the somewhat unimportant one referred to at p. 41, n. 1.

be, the exigencies of the practical work of the profession, especially under our system, will allow him to do so; and if it is desired to encourage the production of Canadian text-books on various branches of the law, probably no better means can be adopted than for public bodies to follow the example of the Dominion and Ontario Governments, and undertake the publication of such collections of the authorities.

In conclusion, I may perhaps express the hope that the contents of these pages may be found of some use and interest, not only to those who have to assist in the practical administration of the law with which it deals, but to those who are, or may hereafter be, concerned in devising Constitutions for confederations of our sister colonies in Australia and South Africa, and, indeed, to students of political science generally, since the problem how best to distribute legislative power between central national legislatures and local law-making bodies is one of general interest and growing importance. And if I may be considered to have contributed something, however trifling, to a more

accurate knowledge of the Constitution of the British Empire, I rejoice that my book has reached completion in the Diamond Jubilee year of our beloved Queen, during whose glorious reign the constitutional foundations of the Empire have been laid broad and deep by the loyal wisdom of British statesmen and the wise loyalty of British people.

A. H. F. Lefroy.

Toronto, December 15th, 1897.

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TABLE OF ABBREVIATIONS*

A.R.	Ontario Court of Appeal reports: Toronto.
B.C.	British Columbia reports: Victoria.
B.C. Sess. Pap.	British Columbia Sessional papers.
Bryce's Amer. Comm.	The American Commonwealth, by James Bryce: MacMillan & Co., 1888.
C.A.	New Zealand Court of Appeal reports.
Can. Com. Journ.	Canada Commons Journal.
Can. Hans.	Canadian Hansard, being official reports of the debates of the House of Commons of the Dominion of Canada: Queen's Printer, Ottawa.
Can. Sess. Pap.	Sessional papers of the province of Canada.
Cart.	Mr. J. R. Cartwright's collection of cases decided on the British North America Act, 1867: Toronto.
Cass. Sup. Ct. Dig.	A digest of cases decided by the Supreme Court of Canada, by Robert Cassels, Q.C.: Carswell & Co., Toronto, 1893.
C.L.J.	The Canada Law Journal: Toronto.
C.L.T.	The Canadian Law Times: Toronto.
Con. Stat., N.B.	Consolidated Statutes of New Brunswick.
C.P.	Upper Canada Common Pleas reports: Toronto.
Dall.	Reports of cases in the Courts of Pennsylvania, by A. J. Dallas, 1830-5.
Dom. Sess. Pap.	Dominion Sessional papers: Queen's Printer, Ottawa.
Dor. Q.A.	Decisions of the Court Appeal (Queen's Bench reports) Quebec, by L. C. W. Dorion: Montreal.
Dor. Q.B., Que.	Same as the last.
Ex. C.R.	Reports of the Exchequer Court of Canada: Ottawa.
Gr.	Reports of cases in the Court of Chancery of Upper Canada, and afterwards of Ontario, by Alexander Grant: Toronto.
Hannay	Reports of cases in the Supreme Court of New Brunswick, by James Hannay, 1870-5: Fredericton and St. John, N.B.

* The references to the English law reports and some few others are omitted from this table as too well known to need explanation.

Haw. Rep. Hawaiian reports: Honolulu.
Hodg. Prov. Legisl. Vol. 1 and 2. See *infra* pp. 140, n. 4, 174, n. 1.
Hodgins' Provincial Legislation, 2nd ed..... Correspondence, reports of the Ministers of Justice, and Orders in Council, upon the subject of Dominion and Provincial Legislation, 1867-1895, by W. E. Hodgins, M.A., Ottawa, 1896.
J.R. N.S.S C..... New Zealand Jurist reports, New Series, Supreme Court.
Knox (N.S.W.)..... Cases in the Supreme Court of New South Wales, by George Knox, Sydney.
L.C.J..... The Lower Canada Jurist, being a collection of decisions of Lower Canada: Montreal.
L.N... The Legal News: Montreal.
M.L.R., Q.B.... Montreal Law reports, Queen's Bench: Montreal.
M.L.R., S.C..... Montreal Law reports, Superior Court: Montreal.
M.R..... Manitoba reports: Winnipeg.
N.B..... New Brunswick reports.
N.S..... Nova Scotia reports.
N.S.W..... New South Wales reports.
N.W.T..... Reports of the Supreme Court of the North-West Territories.
O.A.R Ontario Court of Appeal reports: Toronto.
Ont. Sess. Pap. Ontario Sessional papers: Toronto.
O.P.R..... Ontario Practice reports: Toronto.
O.R..... Reports of decisions in the High Court of Justice for Ontario: Toronto.
O.S..... Upper Canada Queen's Bench and Practice Court reports, old series: Toronto.
P. & B..... Reports of cases in the Supreme Court of New Brunswick, by Wm. Pugsley and G. W. Burbidge.
P.E.I..... Prince Edward Island reports.
P.R..... Ontario Practice reports.
Pugs..... New Brunswick reports, by Wm. Pugsley.
Q.L.R..... The Quebec Law reports.
R. & C..... Russell and Chesley's Nova Scotia reports.
Rev. Stats., N.S..... Revised Statutes of Nova Scotia.
R. & G..... ... Russell and Geldert's Nova Scotia reports.
R.J.Q., S.C.... Les Rapports Judiciaires Officiels de Québec, Superior Court: Montreal.
R.J.Q., Q.B..... Les Rapports Judiciaires de Québec, Queen's Bench: Montreal.
R.L..... La Revue Legale: Montrea[1].
Russ. Eq..... Russell's Nova Scotia Equity decisions: Halifax.

S.C.R.	Supreme Court of Canada reports: Ottawa.
Steph. Dig.	Stephen's Quebec Law digest: Montreal.
Stockton's Bert.	G. F. S. Berton's reports of cases in the Supreme Court of New Brunswick, with notes by A. A. Stockton, M.A.: Carswell & Co., Toronto.
Stuart	Stuart's Lower Canada reports.
Todd's Parl. Gov. in Brit. Col.	Parliamentary Government in the British Colonies, by Alpheus Todd, LL.D., C.M.G., 2nd ed., Longman Green & Co., London, 1894.
U.C.R.	Upper Canada Queen's Bench reports.
V.L.R.	Victoria (Australia) Law reports.
W.L.T.	The Western Law Times reports Winnipeg.
W., W. and A'B.	Wyatt, Webb and A'Beckett's Victorian (Australian) reports.

Table of pages of this work where various sections of the British North America Act, 1867, are specially referred to :

SECTION 9—93-4, 193.

18—749-50.

41—444, 450-1, 511-2, 519-20.

64—15.

88—704, n. 2.

91—(Dominion residuary power) 139, 246-7, 310, n. 2, 316, n. 1, 319-20, 330-2, 381-5, 395, n. 2, 396-410, 435-8, 462-3, 478-9, 497-8, 507-9, 516-7, 526, 532-3, 534, n. 1, 541-3, 567, 572-81, 649, 657, n., 659, 699, n. 1, 712.

(*Non obstante* clause) 308, n. 1, 427-9, 454, 462, 499, n.

No. 1—(Public debt and property) 590-606.

No. 2—(Regulation of trade and commerce) 61, 402, n., 408, n. 2, 410-1, 432, n. 2, 479, n. 1, 480, 484-6, 504, 550-63, 679-82, 686, n., 701-2, 731, n. 1.

No. 3—(Taxation) 449, n. 2, 489-90, 720, n. 1.

No. 7—(Militia, etc.) 685.

No. 9—(Beacons, buoys, etc.) 577-8.

No. 10—(Navigation and shipping) 212, 562-3, 572, 634, n., 639-43, 660-1, 686.

No. 11—(Quarantine, etc.) 236-7, 560, n., 659-60, 686, 693.

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SECTION **91**—No. 15—(Banking, etc.) 428-9, 562, n., 571, n., 664, 669, n.

No. 18—(Bills and notes) 457-9, 486, 518-9.

No. 19—(Interest) 297, 388-90, 421-2, 481, 506-7, 550, n.

No. 21—(Bankruptcy) 209-10, 385-6, 411-2, 426 7, 429-30, 436, n. 3, 438-42, 450, 458, n., 513, 518, 531-2, 535, 550, n., 567-71, 573, 597, n., 628-32, 650, 677-8, 683-5, 687-8.

No. 22—(Patents of invention, etc.) 443-4.

No. 23—(Copyright) 213-6, 223, n. 2, 225-9, 231, n. 1.

No. 24—(Indians, etc.) 591-4, 599, n. 1.

No. 25—(Naturalization and aliens) 459-60.

No. 26—(Marriage and divorce) 488-9.

No. 27—(Criminal law, etc.) 35-7 and Addenda, 49-51, 368-9, 378-80, 407-8, 412-5, 419-22, 444, n., 444-5, 447, n. 1, 463-8, 484, n. 3, 506, n. 2, 514-5, 534, 549, 616, n., 686, n. 1, 694-5, 748.

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No. 6—(Prisons) 732.

No. 7—(Hospitals, etc.) 732, 762.

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No. 9—(Shop, saloon, etc., licenses) 26-8, 53, 54-5, 62-3, 264-6, 292, 373, 375-7, 408, n. 1, 417-8, 456, 484-6, 541-3, 664, 705-7, 722-30, 732, 738-9.

No. 10—(Local works, etc.) 355, n. 3, 391-2, 445-8, 461, 503, 583-4, 596-7, n., 598, 602-5, 633, n., 635-6, 641, n., 642-3, 674, 695-6, 739.

No. 11—(Provincial companies) 457-8, 504, 627, 632-5, 637-44, 762.

No. 12—(Marriage) 63, 488-9.

No. 13—(Property and civil rights) 18-21, 285-6, Addenda to 330-1, 352-3, 396-7, 400, 410-5, 419-21, 425-54, 458, n., 459-63, 478-9, 483, 486-7, 501, 502-6, 520, 531-2, 543-4, 594-7, 615-6, 617-28, 635-6, 643-4, 686, n., 701-4, 752-68.

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No. 15—(Punishment by fine, etc.) 14, 30-1, 35-8, 133, 378-80, 421-2, 463-8, 484, n. 3, 487, 534, n. 2, 660, n. 6, 686, n. 1, 690-1, 693, n. 4.

No. 16—(Merely local or private matters) 25-6, 305, n. 1, 343, 358-60, 360, n. 1, 383-5, 395, 397-411, 416-7, 507-9, 561, n., 565-6, 578-9, 615, 651-61, 681-2, 684, 712, 730-1, 732, 735-40.

93—218, 250-1. And see Addenda to pp. 250-1.

94—315, n. 1, 575, n. 2.

95—460, n.

96—69-71, 128, 162, 175, 387-8, 513, n., 521, n., 522-5, 672, n.

101—321, 515, n. 1, 518-20, 572.

102—609.

108—And Schedule 3. 586-7, 590-3, 598-606.

109—591-2, 594, n., 606-16, 678-9.

111—612, n.

112—612, n.

117—584, 600.

121—731, 737.

122—402, n., 616, n., 680-2, 731.

124—730.

125—614, n. 3.

129—68, 366-70, 513-4.

132—218, 255-9, 375, n. 2.

136—114-5.

142—612, n.

TABLE OF ERRATA.

Page 20, n. 4. For 'constitution' read 'constitutions.'

" 127, n. 2. Insert the word 'case' after the word 'Association.

" 130, n. 3, first line. For 322 read 222.

" 140, last line. For 'Hodgin's' read 'Hodgins'.

" 173, n. 1. For '15 V.' read '15 V.L.R.'

" 231, n. 1, last line but two. For 'March 29th' read 'March 25th.'

" 267, n. 2. For '7 O.A.R.' read '7 O.R.'

" 267, n. 3, last line but one. For 'that is' read 'that it is.'

" 310, third line after Proposition. For 'unrestrictive' read 'unrestricted.'

" 402. For 'Prop. 85' in margin read 'Prop. 35.' For 'Note 2' in sixth line from bottom read 'Note 1.'

" 410. For 'License Act' in last line but one of text read 'Insurance Act.'

" 463, n. 1, twelfth line. For 'Watson' read 'Wason.'

" 480. For 'other' in last line of text read 'others.'

" 559. For 'pp. 339' in eleventh line of notes read 'pp. 399.'

" 615. For 'No. 9 of section 92' in ninth line read 'No. 5 of section 92.'

" 656, n. 3. For 'exp' read 'esp.'

TABLE OF ADDENDA.*

Page 4, n. 1. and 12-14. As to the British North America Act being the reduction into legislative form of a compact or treaty, and the propriety of referring to the Quebec Resolutions in construing it, *cf.* per Gwynne, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 204-10, (1895); per Sedgewick, J., S.C., at p. 231 *et seq.* Pope's Confederation Documents (Toronto, 1895) gives very imperfect minutes of the discussion at the conference at Quebec.

Pages 21-40. In connection with Proposition 3, see, also, per Sedgewick, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 232-6, (1895); also, S.C., at pp. 175, 177-8. See, however, *infra*, p. 552, n. 1.

Page 25. See pp. 652, 730-41.

Page 26. As to taxation by licenses being direct taxation, see pp. 361, n. 2, 723-4.

Page 27, n. 1. See pp. 725-6.

Pages 35-7. On the argument on the Liquor Prohibition Appeal, 1895, Lord Herchell is reported as saying of No. 27, of section 91:—"It is all the criminal law in the widest and fullest sense, except that part of it which is necessary for the purpose of enforcing, whether by fine, penalty or imprisonment any of the laws validly made under the sixteen clauses, under which laws are to be made by the provincial parliament": Printed report at pp. 280-1. See *infra*, p. 398, n. 1. No. 27, sect. 91, B.N.A. Act.

Page 40, n. 1. See p. 748.

Pages 41-71. See *supra* Addenda to pp. 21-40 which apply also to Proposition 4.

Page 45. As to No. 8 of section 92, see p. 398, n. 1. And as to wholesale licenses, see pp. 719-20, 726-30.

Page 45, n. 1. *Cf.* per Taschereau, J., in Huson *v.* The Township of South Norwich, 24 S.C.R. at p. 165, (1895). But see *infra*, p. 398, n. 1.

Page 46, n. 1. And *cf.* per Strong, C. J., in Huson *v.* The Township of South Norwich, 24 S.C.R. at pp. 150-1, (1895). But see *infra* p. 398, n. 1.

Pages 47-49. As to No. 8 of section 92, see p. 398, n. 1; and as to No. 9 of section 92, see pp. 723-30.

Page 51. See Thomas *v.* Haliburton in appeal, *sub nom.*, Fielding *v.* Thomas, [1896] A.C. 600, *infra* pp. 746-50.

Page 52. As to No. 12 of section 91, see pp. 562, 584-90, 615-6.

Page 54. As to No. 8 of section 92, see p. 398, n. 1.

Page 55, n. 1. Add: "*infra* pp. 705 9."

*As to this table of Addenda, see the Preface.

Page 56, n. 2. Add: "And see per King, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 259-61, (1895); per Strong, C.J., in Huson *v.* The Township of South Norwich, 24 S.C.R. at pp. 150-1; per Taschereau, J., S.C., at p. 152, *et seq.* But as to No. 8, of section 92, see *infra* p. 389, n. 1."

Pages 57-61. See p. 398, n 1. And *cf.* per Gwynne, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 223-4; per Sedgewick, J., S.C., at p. 243, *et seq.*; per King, J., S.C., at pp. 259-61.

Pages 61-3. *Cf.* per Gwynne, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 217, per Sedgewick, J., S.C., at pp. 231, 237.

Page 64, n. 1. See pp. 746-9.

Pages 64-9. See pp. 741-9.

Pages 72-86. As to Crown's priority see, also, Att. General *v.* Clarkson, 15 O.R. 632; *Re* Bentinck *v.* Bentinck, [1897], Ch. 673.

Page 81, n. 1. For the recent Shortis case, where the Governor-General pardoned, the Council abstaining from advising one way or the other, see 32 C.L.J. 53.

Power to appoint Queen's counsel.

Pages 87-8. As to the power to appoint Queen's Counsel, and the Ontario statute permitting a Superior Court judge to depute a Queen's Counsel to perform judicial duties see, *In re* Queen's Counsel, 23 O.A.R. 792, (1896), an appeal in which has been argued before the Privy Council and stands for judgment, and an Article in 33 C.L.J., 178.

Page 100, n. 2. As to No. 1 of section 92, see, also, pp. 698-9, 746-8, 755, n. 1.

Pages 111-15. *Cf. In re* Queen's Counsel, 23 O.A.R., at pp. 799, 801-3, 805.

Page 115, n. See p. 320, n. 1.

Pages 123-84. As to Propositions 8 and 9, see the Indian Claims case, [1897] A.C., at p. 212; Mowat *v.* Casgrain, R.J.Q. 6 Q.B., at pp. 22-4, (1897); *In re* Queen's Counsel 23 O.A.R. at pp. 799, 801-3, 805, (1896); and *infra* p. 594, n.

Page 126, n. 2. See p. 586, n. 1.

Page 127, n. 2. See p. 457, n. 2.

Page 128, n. 1. See pp. 159, 165.

Page 159. See pp. 128, n. 1, 165.

Page 161. See pp. 522-5.

Page 164, n. 1. See pp. 522-5.

Page 165. See p. 128, n. 1.

Page 174, n. 1. This refers to the first edition of Mr. Hodgins' work. Since it was printed a second edition, bringing the reports to the year 1895, has been published; and from p. 446 onwards of this work the references are to the second edition.

Page 176, n. 1. See Thomas *v.* Haliburton in appeal, *sub nom.*, Fielding *v.* Thomas, [1896] A.C. 600, and *infra* p. 748, n. 1.

Pages 181-4. See the note of Kennedy *v.* Purcell in the Addenda to pages 511-2, *infra*.

Pages 208-31. In connection with Proposition 12 it may be noted that a long letter appeared in the *Times* of June 1st, 1876, by Historicus, (doubtless Sir W. Vernon-Harcourt), arguing strenuously that there was no renunciation of the paramount authority of the Imperial parliament by the British North America Act, 1867, and showing that this view had been uniformly adopted and acted upon by both the Home and the Canadian authorities. The occasion of the letter appears to have been some pending Merchant Shipping legislation. It was reprinted in the Toronto *Mail* of June 13th, 1876. The subject was also discussed in a leading article in the *Times* of the same date, also reprinted in the *Mail*, and in one in the London *Standard* of June 3rd, 1876, reprinted in the Toronto *Mail* of June 17th, 1876.

Paramount authority of Imperial parliament.

Page 209. In the letter of Historicus just above referred to in these Addenda, he says of the Colonial Laws Validity Act, 1865: "It applies to the Dominion legislature of Canada as much as to the representative legislature of any other colony. It is only the declaration of that which has always been the law, (*vide* 7-8 Will. 3, c. 22, s. 10, and 8-9 Vict. c. 93, s. 63), and always must be the law between a colony and its metropolis." *Cf.*, also, 6 Geo. 4, c. 114, s. 49; and see *infra*, pp. 746-9.

Page 212. See p. 642, n. and Addenda thereto *infra*.

Page 223. As to Sir J. Thompson's contention, *cf.* in reference to the Constitutional Act, 31 Geo. 3, c. 31, Gordon *v.* Fuller, 6 O.S. at pp. 182, 187, 192-3.

Page 243, n. 3. See 24 S.C.R. at pp. 204-10, 231 *et seq.*, (1895).

Pages 250-1. For a useful review of the various decisions in reference to power over education under section 93 of the British North America Act, see Mr. Wheeler's note to that section in his Confederation Law of Canada, at pp. 332-88, in which he gives a very full report of the New Brunswick School case before the Privy Council. And as to the futility of a provincial legislature attempting to fetter its own future action, see the report of Sir John Thompson, of February 17th, 1894: Hodgins' Provincial Legislation, 2nd ed., at pp. 1227-8.

Power over education under sect. 93 of B.N.A. Act.

Pages 254-5. As to its not being necessary that taxation should be equal, see p. 720, n. 1.

Page 256. It would seem from Wheeler's Confederation Law of Canada at p. 122, that there was an unsuccessful application made to the Privy Council for leave to appeal in Regina *v.* Wing Chong.

Page 257, n. 2. Walker *v.* Baird is reported below, before the Supreme Court of Newfoundland, at p. 490 of Newfoundland Decisions; see *infra* Addendum to p. 321, n, 5. The judgments draw a distinction between treaties of peace "which are binding upon the nations even to the extent of the alienation of the vested rights of subjects," and such a *modus vivendi* as was there in question, which "stands upon a different footing as regards the constitutional rights of the subject," and the statement in Sir James Stephen's History of the Criminal Law, (Vol. 2, p. 61), that "the doctrine as to acts of State can apply only to acts which

Treaties and Acts of State.

affect foreigners, and which are done by the orders or with the ratification of the Sovereign. As between the Sovereign and his subjects there can be no such thing as an act of State. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals"—is referred to and relied on. And authorities are collected showing that an action will lie for a tortious act, notwithstanding it may have had the sanction of the highest authority in the State. The case came up on the pleadings, and the Court held that merely setting up that the trespass complained of was an act of State committed under the authority of the *modus vivendi* with France was no sufficient answer to the action; and the Privy Council on appeal briefly expressed their concurrence: [1892] A.C. 491.

Treaties and Acts of State.

Page 260, n. 1. And see per Tuck, J., in Wilson *v.* Codyre, 26 N.B., at pp. 524-5, (1886); and *infra* pp. 303-4.

Pages 273-6. In their recent judgment in the Liquor Prohibition Appeal, 1895, [1896] A.C., at p. 363, the Privy Council say that they are unable to regard the prohibitive enactments of the Canada Temperance Act, 1886, as regulations of trade and commerce, thus removing any doubt as to their view resulting from their words in Russell *v.* The Queen, 7 App. Cas. at p. 842, 2 Cart. at p. 26.

Page 291, n. 3. As to similar provisions in the Constitutions of several States of the Union, see Cooley on Constitutional Limitations, 6th ed., pp. 169-74.

Page 292, n. 1. But see p. 398, n. 1.

Page 294, n. 3. See pp. 618-26 as to provincial law in relation to Dominion, Imperial and foreign corporations.

Page 308, n. 1. Add: "See especially pp. 647-9 *infra*, from which it appears that on the recent Liquor Prohibition Appeal, 1895, the Privy Council have very much supported Gwynne, J.'s reading of the clause in question. See, however, *infra* pp. 650-1."

Page 320. See further as to legislation in reference to railway crossings, p. 399, n. 1, and Addenda, and pp. 445-6.

Page 321, n. 5. In two cases reported in the recently published volume of Newfoundland Decisions, (J. W. Withers, Queen's Printer, St. John's N.F., 1897), the question of the territorial limits of the jurisdiction of the local legislature is discussed, and found to extend to, but not beyond, three miles outside of a line drawn from headland to headland of the bays of Newfoundland. The first is Rhodes *v.* Fairweather, p. 321, (1888), and was an action for penalties against the master of a British ship, registered in Scotland, for killing and taking on board seals previous to the date fixed by the legislature of Newfoundland for sealing, the seals in question having been all taken outside the above limits. The ship was British owned, and registered in Scotland, where the owners and master resided, and also several of the crew, who were engaged there. She cleared from St. John's for the seal fishery, and returned there after the voyage for the purpose of manufacture and shipment. Carter, C.J., after referring to Imperial Acts in reference to offences committed on board British ships, says, at p. 325: "Has the legislature of this colony authority to pass an Act conferring jurisdiction of the like char-

Territorial limits of colonial jurisdiction.

acter over persons on board a ship on the high seas beyond colonial limits, whether registered in this colony or other British port? I apprehend it has not. Then by what authority can it prohibit or confer the right of killing seals beyond its territorial limits? The *Terra Nova*," (the defendant's ship), "is a ship of the British nation, and as such the Imperial parliament would unquestionably be competent to give effect to an Act prohibiting with penalties the killing of seals or such like, at a specified time, anywhere over the sea, by persons on board said ship, but that is from supreme, and unlike colonial limited, authority." Little, J., at p. 343, after referring to the class of Imperial Acts above mentioned, says: "This sovereign authority rendering the subject amenable under such circumstances to Imperial laws is inherent in the State or nation; and, as a colony is only a part of the State which created it, it is obvious it cannot exercise these powers which pertain alone to the nation or State creating it." Still he is less positive in denying the power of the legislature in such a case as that before the Court, saying rather that the statute should not be construed to apply to such a case in the absence of any express language showing an intention on the part of the legislature that its provisions might operate beyond the territorial limits of the colony. Pinsent, J., thought the defendant should be held liable. He says at pp. 333-4:—"I take it to be a sound doctrine, as a general proposition, that the limits of colonial jurisdiction extend to only three miles from the shore, and that a colonial legislature cannot confer a jurisdiction beyond its territorial limits, but here the exercise of the jurisdiction is upon persons and things within the limits, although it may be for acts done in violation of our law outside those limits. . . We have here to guard against confounding the territorial limits of the government with the power of legislation over persons and things, between which there is no necessary coincidence, except as to the place of putting the law in execution against persons who owe subjection to it." In his opinion the defendant, his ship, and ship owners bore such a relation to the colony that the legislation was *intra vires* to control them in their fishing operations, even when outside the three-mile limit. But he says, at p. 334: "If the case now before us were one of a foreign cruiser at sea, prosecuting the business from a foreign port, and taking seals outside the colonial limits, there could be no doubt the Act would have no application." The second case is that of Queen *v.* Delepine, *ibid.* at p. 378, (1889), where the defendants (foreign fishermen) were proceeded against before a magistrate for violation of the Newfoundland Bait Act, 50 Vict. c. 1, namely, purchasing bait fishes for exportation and bait purposes, without having taken out the license provided for in the said Act. Here, too, it was held that the territorial jurisdiction of the local legislature extends to three miles outside a line drawn from headland to headland; and, as in Rhodes *v.* Fairweather, special reference is made to Anglo-American Telegraph Co. *v.* the Direct United States Co., a decision of Hoyles, C.J., to that effect, affirmed in appeal to the Privy Council: 2 App. Cas. 394, (1877). See, also, The Ship Frederick Gerring, Jr. *v.* The Queen, 27 S.C.R. 271, (1897).

Territorial limits of colonial jurisdiction in Newfoundland.

The three mile limit.

Page 327, n. 1. The case referred to by Mr. Todd, *ad loc. cit.*, is doubtless *In re* Gleich, 1 O.B. & F. (New Zealand Supreme Court) 39, (1879).

Page 329, n. 2. See the words of Dorion, C. J., in Proposition 45, at p. 510, *infra*; also see Addenda to p. 321, n. 5, *supra*.

Pages 330-1. As to the power attributed to the New Zealand legislature by Ashbury *v.* Ellis, residing in our provincial legislatures under Nos. 13 and 14 of section 92 of the British North America Act, see Stairs *v.* Allan, 28 N.S. 410, at pp. 418-9, (1896); McCarthy *v.* Brener, (N.W.T.), 16 C.L.T. 201, (1896).

Page 333, n. 5. See pp. 757-62.

Pages 333-8. And see now confirming the conclusions arrived at in the text. *Re* Criminal Code sections relating to Bigamy, 27 S.C.R. 461.

Page 343. As to No. 16 of section 92, see also, pp. 652-3.

Page 343, n. 3. See, also, pp. 655-61.

Page 348, n. 1. See p. 393, n. 1.

Pages 350-2. See pp. 399-401.

Page 352. As to No. 8 of section 92, see p. 398, n. 1.

Pages 358-60. See pp. 399-401, 408-10, 507-9.

Page 360, n. 2. *Cf.* Richer *v.* Gervais, R. J. Q. 6 S. C. 254, (1894), where it was held that a Dominion Act declaring a non-juridical day must be interpreted as relating only to Dominion matters. And as to the term 'police regulations,' see *infra* p. 556, n. 2.

Page 361, n. 2. See Lambe *v.* Fortier, in App., R.J.Q. 5 S.C. 355, 25 S.C.R. 422; and see *infra* pp. 723-4.

Pages 365-6. In connection with Propositions 29-32, see, also, pp. 530-1.

Pages 366-8. As to the Dobie case, see, also, *infra* pp. 760-5.

Page 396, n. 4. Add: "And Sauve *v.* The Corporation of Argenteuil, 21 L.C.J. 119, (1876)."

Pages 369, n. 5. See pp. 399-401.

Page 372. In connection with Proposition 33, see, also, pp. 437-8.

Pages 375-6. And see pp. 718-20

Page 378, n. 4. See pp. 399-401, 558, n. 2.

Page 383, n. 7. See the decision of the Privy Council reported, [1896] A.C. 348.

Page 385, n. 2. See especially at pp. 399-401, 408-10.

Pages 385-6. See pp. 567-71.

Page 391, n. 1. See pp. 746-50 for the Privy Council decision *sub nom.*, Fielding *v.* Thomas.

Page 393, n. 1. For 65 L.J. 26, read [1896] A.C. 348.

Page 395, n. 2. For 65 L.J. at pp. 33-4, read [1896] A.C., at pp. 362-3.

Page 398, n. 1. For 65 L.J. at p. 34, read [1896] A.C. at pp. 363-4.

Page 399, n. 1. For 32 C.L.J. 415, read 27 O.R. 559; and as to railway crossings, and powers of the Railway Committee of the Privy Council, see, also, Grand Trunk R.W. Co. *v.* Hamilton Radial Electric R.W. Co., 33 C.L.J. 436, 17 C.L.T. 220, (1897), Railway crossings and the Railway committee.

Page 399, n. 2. For 65 L.J. 26, read [1896] A.C. 348.

Page 400, n. 1. As to the distinction between wholesale and retail, see pp. 726-30.

Page 401, n. 1. For 65 L.J. at p. 38, read [1896] A.C., at p. 371.

Page 401, n. 2. See pp. 579-80. And *cf.*, as to laws against gambling, Regina *v.* Keefe, 1 N.W.T. (No. 2), 86 (1890); Regina *v.* Fleming, 15 C.L.T. 244, (1895); noted *infra* p. 414.

Page 403, n. 1. As to wholesale and retail, see pp. 726-30.

Page 407, n. 1. For 65 L.J. at p. 32, read [1896] A.C. at p. 360. And see *infra* pp. 551-9.

Page 409, n. 1. For 65 L.J. at p. 33, read [1896] A.C. at pp. 361-2.

Page 411, n. 3. See last Addendum.

Page 414, n. 4. And *cf.* Kitchen *v.* Saville, 17 C.L.T. at p. 91, (1897).

Pages 441-2. See pp. 518-9.

Pages 445-6. See the Addenda to p. 399, n. 1.

Page 446, n. See pp. 596-7, n.

Pages 463-8. See Reg. *ex rel.* Brown *v.* Robert Simpson Co., 28 O.R. 231, (1896).

Page 465, n. 1. See Addenda to p. 360, n. 2.

Page 486, n. 1. See Proposition 53, and pp. 584 90.

Page 504. And see per Davidson, J., in Heneker *v.* Bank of Montreal, R.J.Q. 7 S.C. at p. 263, (1895).

Pages 507-9. See pp. 651-61.

Pages 511-12. As to Valin *v.* Langlois see also Kennedy *v.* Purcell, before the Privy Council, July 7th, 1888, noted at length in Wheeler's Confederation Law of Canada, at pp. 314-7, refusing leave to appeal from the decision of the Supreme Court of Canada in a Dominion Election matter, and citing in support Théberge *v.* Laudry, 2 App. Cas. 102, 2 Cart. 1, (1876), and Valin *v.* Langlois, but not deciding any more, than in those cases, the abstract question of the prerogative right to entertain an appeal in such a matter. Appeals to Privy Council in election matters.

Page 517. See p. 677, n. and Addendum thereto *infra*.

Pages 519-20. And see McLeod *v.* Noble, 33 C.L.J. 533, 569, (1897).

Page 520. As to the Railway Committee of the Privy Council, see *supra* Addendum to p. 399, n 1.

Pages 538-9. See Addendum to pp. 519-20 *supra*.

Page 561, n. As to Acts respecting game see pp. 654-5; and as to the reference to The Liquor Prohibition Appeal, 1895, [1896] A.C. at p. 368, see pp. 755-6.

Pages 562-3. See p. 641, n.

Pages 578-9. See pp. 655-61.

Page 594, n. For Mowat *v.* Casgrain, see now R.J.Q. 6 Q.B. 12, (1897), and for the Indian Claims case, see [1896] A.C. 199.

Page 595, n. But as to 'acts of State' see the Addenda to p. 257, n. 2, *supra*.

Provincial Acts in relation to Dominion railways.

Pages 596-7, n. In connection with Monkhouse *v.* Grand Trunk R.W. Co., see now Washington *v.* Grand Trunk R.W. Co., 24 O.A.R. 183, (1897), at pp. 185-6, where Osler, J. A., cites it and says :—"The corresponding enactments of the Workmens Compensation for Injuries Act, 49 Vict. c. 28, s. 4, O., 55 Vict. c. 30, s. 5, O., must also, in my opinion, be confined in their application to the former class of railway companies," (*sc.* those which are within the jurisdiction of the provincial legislature), "and for the same reason, namely, that they relate to the construction or arrangement of the railway track itself." And he distinguishes Canada Southern R.W. Co. *v.* Jackson, 17 S.C.R. 316, as relating to other provisions of the Workmens Compensation for Injuries Act dealing with the general law of Master and Servant.

Page 608, n. 1. As to the three mile limit, see the Addenda to p. 321, n. 5, *supra*.

Page 612, n. For 66 L.J. (P.C.) 11, read [1896] A.C. 199.

Page 623, n. 1. As to the validity of a provincial Act forbidding the transfer of property till taxes paid, and its applicability to bank shares, see Heneker *v.* Bank of Montreal, R.J.Q. 7 S.C. 257, (1895). And as to provincial licensing of private or unincorporated banks being *ultra vires* as contrary to the intention of the Bank Act, see Hodgins' Provincial Legislation, 2nd ed., at p. 1268.

Page 624, n. 2. For the Brewers' and Maltsters' Association case, see now [1897] A.C. 231.

Ships and their port of registry.

Page 642, n. In a case of Rhodes v. Fairweather, Newfoundland Decisions, at p. 337, (1888), (see the Addenda to p. 321, n. 5, *supra*), where a question arose as to the power of the local legislature to control fishing operations outside the three mile limit, and it appeared that the ship of the defendant, who was being prosecuted under such a law, was registered in Scotland, and not in Newfoundland, Pinsent, J., said that in his opinion no point could be made of that fact. It was immaterial in what port a Brittsh vessel might be registered, she would be a British ship everywhere and entitled to the same privileges and subject to the same obligations. Most or many of the ships owned or engaged in the commerce of the colony were registered in Great Britain. The point was, in what business were they employed, and to what laws were they for the time being subject.

Pages 654-5. As to Acts respecting game, see p. 561, n.

Page 677, n. *Cf.* as to taxing soldiers and sailors, per Robinson, C. J., in Tully *v.* The Principal Officers of Her Majesty's Ordnance, 5 U.C.R. at p. 14, (1847).

Pages 759-60. As to the locality of a debt see, also, Henty *v.* The Queen [1896], A.C. 567.

LIST OF LEADING PROPOSITIONS

LEADING PROPOSITIONS.

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1. The British North America Act is the sole charter by which the rights claimed by the Dominion and the Provinces respectively can be determined.

2. Although the British North America Act was founded upon the Quebec resolutions, and so must be accepted as a treaty of union between the provinces, yet when once enacted it constituted a wholly new point of departure, and established the Dominion and Provincial Governments with defined powers and duties, both alike derived from it as their source. 1-20

3. Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes [of a similar character, that is to say, statutes conferring constitutional charters]. The British North America Act cannot be construed in a rigidly technical manner. 21-40

4. The state of legislation and other circumstances in the various provinces of the Dominion of Canada prior to

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Confederation may sometimes have to be considered in determining the construction of the clauses of the British North America Act respecting the distribution of legislative powers, as may also the
40-71 character of legislation in England itself.

5. The prerogative of the Crown runs in the colonies to the same extent as in England, and no distinction can properly be drawn between the rights and prerogatives of the Crown suing in respect of Imperial rights, and the rights of the
72-86 Crown with regard to the colonies.

6. Her Majesty's prerogative rights over the Dominion of Canada as the fountain of honour have not been in the least degree impaired or lessened by the
87-89 British North America Act.

7. The Lieutenant-Governors of Provinces, when appointed, are as much the representatives of Her Majesty for all purposes of Provincial Government as the Governor-General himself is for all
90-122 purposes of Dominion government.

8. Executive power is derived from legislative power, unless there be some
123-176 restraining enactment.

9. The Crown is a party to and bound

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by both Dominion and Provincial statutes, so far as such statutes are *intra vires*, that is, relate to matters placed within the Dominion and Provincial control respectively by the British North America Act. 176-184

10. The possession by the Federal Government of the veto power over Provincial legislation is a special feature of the Constitution of the Dominion of Canada, which distinguishes it from the Constitution of the United States of America. 185-203

11. No consent or acquiescence of the Crown by non-exercise of the veto power, or otherwise, can render valid an Act otherwise *ultra vires* and unconstitutional under the British North America Act. 204-207

12. The powers of legislation conferred upon the Dominion Parliament and the Provincial Legislatures, respectively, by the British North America Act are conferred subject to the sovereign authority of the Imperial Parliament. 208-231

13. The power of the Imperial Parliament in the matter of the creation and distribution of colonial legislative powers is supreme, and no Colonial Secretary has *ex officio* a right by a despatch, or other-

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wise, either to add to, alter, or restrain any of the legislative powers conferred by the British North America Act, or indeed by any Act, or to authorize a subordinate
232-236 legislature to do so.

14. The declarations of the Dominion Parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered. And the same applies *a fortiori* where the Provincial Legislatures have by their legislation shown agreement in the views of the Dominion Parliament as to their respective powers. In like manner the views acted upon by the great public departments, as expressed in Imperial despatches, or otherwise, carry
236-241 weight in the absence of judicial decision.

15. It is clear that if the Dominion Parliament or a Provincial Legislature do not possess a legislative power, neither the exercise nor the continued exercise of a power not belonging to them can confer
241 it, or make their legislation binding.

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16. The Federal Parliament cannot amend the British North America Act, nor, either expressly or impliedly, take away from, or give to, the Provincial Legislatures a power which the Imperial Act does, or does not, give them; and the same is the case *mutatis mutandis* with the Provincial Legislatures. 242-243

17. Neither the Dominion Parliament nor Provincial Legislatures are in any sense delegates of, or acting under, any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for each Province, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament, in the plenitude of its power, possessed and could bestow. And so with the Dominion Parliament, with respect to those matters over which legislative authority is conferred, plenary powers of

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legislation are given as large, and of the same nature, as those of the Imperial
244-259 Parliament itself.

18. It is not to be presumed that the Dominion Parliament has exceeded its powers, unless upon grounds really of a serious character; and so, likewise, in respect to Provincial statutes every possible presumption must be made in
260-269 favour of their validity.

19. If it be once determined that the Dominion Parliament or a Provincial Legislature has passed an Act upon any subject which is within its jurisdiction to legislate upon, its jurisdiction as to the terms of such legislation is as absolute as was that of the Parliament of Old Canada, or as is that of the Imperial Parliament in the United Kingdom, over a like sub-
270-272 ject.

20. If the Dominion Parliament or a Provincial Legislature legislates strictly within the powers conferred, in relation to matters over which the British North America Act gives its exclusive legislative control, we have no right to enquire what
273-278 motive induced it to exercise its powers.

21. When once an Act is passed by the

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Dominion Parliament or by a Provincial Legislature in respect to any matter over which it has jurisdiction to legislate, it is not competent for any Court to pronounce the Act invalid because it may affect injuriously private rights, any more than it would be competent for the Courts in England, for the like reason, to refuse to give effect to a like Act of the Parliament of the United Kingdom. If the subject be within the legislative jurisdiction of the Parliament, or of the Provincial Legislatures, respectively, and the terms of the Act be explicit, so long as it remains in force, effect must be given to it in all Courts of the Dominion, however private rights may be affected. 279-288

22. Although part of an Act either of the Dominion Parliament or of a Provincial Legislature may be *ultra vires*, and therefore invalid, this will not invalidate the rest of the Act, if it appears that the one part is separate in its operation from the other part, so that each is a separate declaration of the legislative will, and unless the object of the Act is such that it cannot be attained by a partial execution. 289-299

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23. A transaction which is *ultra vires* of the parties to it can derive no support from an Act which is itself *ultra vires* of the legislature passing it; nor will the right of those affected by it, to treat it as of no legal force or validity, be interfered with by such an Act. So likewise incapacities imposed upon persons guilty of certain practices by an Act which is *ultra vires* will not enure against, or
300-304 affect, those persons.

24. The scheme of the British North America Act comprises a fourfold classification of powers:—Firstly, over those subjects which are assigned to the exclusive plenary power of the Dominion Parliament; secondly, over those assigned exclusively to the Provincial Legislatures; thirdly, over subjects assigned concurrently to the Dominion Parliament and the Provincial Legislatures; and, fourthly, over a particular subject, namely, education, which for special reasons is dealt with exceptionally, and made the
305-309 subject of special legislation.

25. The frame of section 92, of the British North America Act, differs from that of section 91 in its form. That of

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section 91 is general, of section 92 particular. By section 91, the Imperial Parliament unequivocally, but in general terms, declares its intention to be to place under the jurisdiction of the Dominion Parliament all matters, excepting only certain particular matters assigned by the Act to the Local Legislatures. The 92nd section, therefore, instead of dealing with the subjects to be assigned to the Local Legislatures in the same general terms as had been used in the 91st section, by placing under the jurisdiction of those legislatures all matters of a purely local or private nature within the Province (a mode of expression which would naturally lead to doubt and confusion, and would be likely to bring about that conflict which it was desirable to avoid), enumerates, under items numbered from 1 to 15 inclusive, certain particular subjects, all of a purely provincial, municipal and domestic nature, that is to say, "of a local or private character," and then winds up with item No. 16, to prevent the particular enumeration of the "local and private" matters included in items 1 to 15 being construed to operate as an exclusion of any other matter, if any

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305-309 there might be, of a merely local or private nature.

26. Sections 91 and 92 of the British North America Act purport to make a distribution of legislative powers between the Parliament of Canada and the Provincial Legislatures, [subject to the provisions of the Act itself], section 91 giving a general power of legislation to the Parliament of Canada, [within the territorial limits of the Dominion], subject only to the exception of such matters as by section 92 are made the subjects upon which the Provincial Legislatures are
310-346 exclusively to legislate.

27. [With the exception of laws in relation to agriculture and immigration], if the subject-matter of an Act is within the jurisdiction of the Dominion Parliament, it is not [in its entirety] within the jurisdiction of the Provincial Legislatures [whether acting severally or in concert with each other, though some of the provisions of such Act, ancillary to the main subject of legislation, may be within such Provincial jurisdiction]; and if the subject-matter of an Act is not within the jurisdiction of the Provincial Legislatures [acting either severally or in concert with

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each other], it is within the jurisdiction of the Dominion Parliament. 347-355

28. With the exception of agriculture and immigration, there is no subject-matter over which there can [speaking strictly be said to] exist concurrent powers of legislation; and, even then, should there be conflict, the authority of the Parliament of Canada is supreme, by express provision of section 95 of the British North America Act. 355-364

29. There is no power given by the Confederation Act to the Dominion Parliament to amend or repeal an Act passed by a Provincial Legislature within the limits of its authority, nor to the Provincial Legislatures to amend or repeal a valid Dominion Act. 365-366

30. The powers conferred by section 129 of the British North America Act upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of the Province of Canada, are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of that Act; and the power of the Provincial Legislature to destroy a law of the old Province of Canada is

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measured by its capacity to reconstruct
366-370 what it has destroyed.

31. In no case can an Act of the old Province of Canada, applicable to the two Provinces of Ontario and Quebec, be validly repealed by one of them, unless the nature of the act is such that in the result it still remains in full vigour in the
371 other.

32. The Parliament of Canada cannot under colour of general legislation deal with what are provincial matters only; and, conversely, Provincial Legislatures cannot under the mere pretence of legislating upon one of the matters enumerated in section 92 really legislate upon a matter assigned to the jurisdiction of the Par-
372-381 liament of Canada.

33. The Federal Parliament cannot extend its own jurisdiction by the territorial extension of its laws, and legislate on subjects constitutionally provincial, by enacting them for the whole Dominion, as a Provincial Legislature cannot extend its jurisdiction over matters constitutionally federal, by a territorial limitation of its laws, and legislate on matters left to the Federal power by enacting them for

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one province only, as, for instance, incorporating a bank for a province. 381-386

34. If the Dominion Parliament, or the Provincial Legislatures, as the case may be, have no power to legislate directly upon a given subject-matter, neither may they do so indirectly. 386-392

35. Subjects which in one aspect and for one purpose fall within the jurisdiction of the Provincial Legislatures may, in another aspect and for another purpose, fall within the jurisdiction of the Dominion Parliament. 393-415

36. The true nature and character of the legislation in the particular instance under discussion—its grounds and design and the primary matter dealt with—its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs, and any merely incidental effect it may have over other matters does not alter the character of the law. 416-424

37. In assigning to the Dominion Parliament legislative jurisdiction in respect to the general subjects of legislation enumerated in section 91 of the British North America Act, the Imperial statute, by necessary implication, intended to con-

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fer on it legislative power to interfere with [deal with, and enroach upon] matters otherwise assigned to the Provincial Legislatures under section 92, so far as a general law relating to those subjects so assigned to it may affect them, [as it may also do to the extent of such ancillary provisions as may be required to prevent the scheme of such law from being defeated]. As to the applicability of a similar principle *mutatis mutandis* to Pro-
425-468 vincial Legislatures, *quære*.

38. As it was scarcely possible to make a complete enumeration of all the powers to be vested in the Dominion Parliament and Provincial Legislatures respectively, and, no doubt, to avoid grave inconveniences, use was made in drawing our Constitution, as in that of the United States, of general langugage, containing in principle the conferred powers, and leaving to future legislation [and judicial interpretation] the task of completing the
469-476 details.

39. In order to construe the general terms in which the classes of subjects in sections 91 and 92 of the British North America Act are described, both sections and the other parts of the Act must be

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looked at, to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. 477-483

40. The British North America Act has to be construed as a whole, and where some specific matter is mentioned as within the exclusive power of one body, Dominion Parliament or Provincial Legislature, as the case may be, which, but for that reference, would fall within the more general description of a subject-matter confined to the other, the statute must be read as excepting it from that general description. 483-487

41. With regard to certain classes of subjects generally described in section 91 of the British North America Act, legislative power may reside as to some matters falling within the general description of these subjects in the Legislatures of the Provinces; [and, in a sense, the converse is also true in certain cases, with regard to the subjects generally described in section 92 and the legislative power of the Dominion Parliament]. 487-494

42. The Dominion Parliament and Provincial Legislatures have power to

Pages. legislate conditionally; for instance, by enacting that an Act shall come into operation only on the petition of a ma-
495-496 jority of electors.

43. In determining the validity of a Dominion Act, the first question to be determined is, whether the Act falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces. If it does, then the further question will arise, whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and so does not still belong to the Dominion Parliament. But if the Act does not fall within any of the classes of subjects in sec-
497-501 tion 92, no further question will remain.

44. Before the laws enacted by the Federal authority within the scope of its powers, the provincial lines disappear; for these laws we have a quasi legislative union; these laws are the local laws of the whole Dominion, and of each and
502-509 every province thereof.

45. The Dominion Parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion, whether they be officials of Provincial

Courts, other officials, or private citizens; and there is nothing in the British North America Act to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers, as to matters which do not come within the subjects assigned exclusively to the legislatures of the Provinces, [or to deprive them of jurisdiction over such matters]; and so, also, it would appear that in matters within their sphere Provincial Legislatures can impose duties upon Dominion officials in certain cases. Pages. 510-525

46. Where in respect to matters with which Provincial Legislatures have power to deal, provincial legislation directly conflicts with enactments of the Dominion Parliament,—whether the latter immediately relate to the enumerated classes of subjects in section 91 of the British North America Act, or are only ancillary to legislation on the said classes of subjects, or are enactments for the peace, order, and good government of Canada, in relation to matters not coming within the classes of subjects assigned exclusively to the Provincial Legislatures, nor within the said enumerated classes of section 91,—

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the provincial legislation must yield to
526-537 that of the Dominion Parliament.

47. Provincial Legislatures have no power to confer jurisdiction or to legislate at all in reference to proceedings taken under a statute of the Dominion Parliament, legislating within the subjects assigned to it by the British North America Act. And a similar limitation applies in the case of the Dominion Parliament in reference to proceedings under provincial statutes. But Provincial Legislatures may legislate in aid and furtherance of
538-540 Dominion legislation.

48. An Act of the Dominion Parliament is not affected in respect to its validity by the fact that it interferes prejudicially with the object and operation of Provincial Acts, provided that it is not in itself legislation upon or within one of the subjects assigned to the exclusive legislative jurisdiction of the Provincial
541-546 Legislatures.

49. The principle of the 91st section of the British North America Act is to place within the legislative jurisdiction of the Dominion Parliament general subjects which may be dealt with by legislation,

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as distinguished from subjects of a local or private nature in the province. 547-564

50. If an Act of the Parliament of Canada, the objects and scope of which is general, and within its proper competency to deal with, provides that it shall come into force in such localities only in which it shall be adopted in a certain prescribed manner, or, in other words, by local option, this conditional application of the Act does not convert it into legislation in relation to matters of a merely local or private nature, which by No. 16 of section 92 of the British North America Act are within the exclusive control of the Provincial Legislatures. The manner of bringing such an Act into force does not alter its general and uniform character. 565-566

51. If the subject-matter dealt with comes within the classes of subjects assigned to the Parliament of Canada, [or if, though this be not the case, the law be one for the peace, order, and good government of Canada in relation to any matter not coming within the classes of subjects assigned to the Legislatures of the Provinces], there is no restriction upon that Parliament to prevent it passing a law affecting one part of the Dominion

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and not another, if in its wisdom it thinks the legislation applicable to or desirable
567-581 in one and not in the other.

52. As to matters coming within the classes of subjects enumerated in section 91 of the British North America Act, over which the exclusive legislative authority of the Parliament of Canada is declared to extend, there is not to be found one word expressing or implying the right to interfere with Provincial
582-584 executive authority.

53. We are not to assume, without express words or unavoidable implication, that it was the intention of the Imperial Legislature to confer upon the Dominion Parliament the power to encroach upon private and local rights of property, which by other sections of the Act have been especially confided to the protection and
584-590 disposition of another legislature.

54. When a question arises as to whether the Dominion Parliament has power in any case over any property or civil rights in a Province, it is always necessary to form an accurate judgment upon what is the particular subject-matter in each case, for the extent of the control of Parliament over the subject-matter may

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possibly be limited by the nature of the subject.

[Decisions upon questions arising under the sections of the British North America Act relating to public property referred to and discussed.] 590-616

55. The Dominion Parliament can alone incorporate companies with powers to carry on business throughout the Dominion, and the business of companies so incorporated may have to do with property and civil rights, yet it cannot empower them to carry on business in any Province otherwise than subject to and consistently with the laws of that Province, [unless the business is such that power to make laws in relation to it is exclusively in the Dominion Parliament, under one of the enumerated heads of section 91 of the British North America Act]. 617-643

56. The fact that Provincial Legislatures may have passed Acts relating to companies of a particular description, such, for example, as building societies, and defining and limiting their operations, does not interfere with the power of the Dominion Parliament to incorporate such companies, with power to operate throughout the Dominion. 643-644

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57. The fact that a company incorporated under an Act of the Dominion Parliament with power to carry on its business throughout the Dominion, chooses to confine the exercise of its powers to one Province cannot affect its status or capacity as a corporation, if the Act incorporating the company was originally within the legislative power of the Do-
644 minion Parliament.

58. In determining the validity of a Provincial Act, the first question to be decided is, whether the Act impeached falls within any of the classes of subjects enumerated in section 92 of the British North America Act, and assigned exclusively to the Legislatures of the Provinces; for, if it does not, it can be of no validity, and no further question would then arise. It is only when an Act of the Provincial Legislature *primâ facie* falls within one of these classes of subjects that the further question arises, namely, whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, [and so does not belong to the Dominion
645-646 Parliament].

59. Any matter coming within any of

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the classes of subjects enumerated in section 91 of the British North America Act shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislature of the Provinces. 647-661

60. Where the validity of a Provincial Act is in question, and it clearly appears to fall within one of the classes of subjects enumerated in section 92 of the British North America Act, the onus is on the persons attacking its validity to show that it does also come within one or more of the classes of subjects specially enumerated in section 91. 662

61. If on due construction of the British North America Act, a legislative power falls within section 92, it is not to be restricted or its existence denied because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament. Whatever power falls within the legitimate meaning of the classes in section 92, is what the Imperial Parliament intended to give; and to place a limit on it because the power may be

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used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the Fed-
663-682 eration Act.

62. A Provincial Legislature is not incapacitated from enacting a law otherwise within its proper competency merely because the Dominion Parliament might, under section 91 of the British North America Act, if it saw fit so to do, pass a general law which would embrace within its scope the subject matter of the Pro-
683-688 vincial Act.

63. Within the area and limits of subjects mentioned in section 92 of the British North America Act Provincial Legislatures are supreme, and have the same authority as the Imperial Parliament or the Parliament of the Dominion would have, under like circumstances, to confide to a municipal institution or body of its own creation, authority to make by-laws or regulations as to subjects specified in the enactment and with the object of carrying the enactment into operation
689-700 and effect.

64. The aim of the law-giver in dividing the legislative powers by sections 91 and 92 of the British North America Act

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between the Federal Government and the Provinces was, so far as compatible with the new order of things, to conserve to the latter their autonomy in so far as the civil rights peculiar to each of them were concerned. 701-704

65. Co-equal and co-ordinate legislative powers in every particular were conferred by the British North America Act on the Provinces. The Act placed the Constitutions of the Provinces on the same level. 705-709

66. The Provincial Legislatures have no powers excepting the enumerated powers which are given to them by the British North America Act. They cannot legislate beyond the prescribed subjects.

[Provincial powers of taxation specially discussed.] 710-750

67. Local Legislatures cannot by corresponding legislation in any degree enlarge the scope of their powers. 751

68. A Provincial Legislature by virtue of No. 13 of section 92 of the British North America Act has power to make laws in relation to such 'property and civil rights' [within the meaning of that clause as restricted to allow scope for the due operation of the other provisions of the said Act] as have a local position

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within the Province; but they have no such power in relation to property and civil rights having their local position in another Province; and if, in any case, they cannot legislate in relation to the one, without at the same time legislating in relation to the other, that is a case beyond their powers of legislation altogether.

752-770

INTRODUCTORY CHAPTER

INTRODUCTORY CHAPTER.

Constitutional writers in the United States, while travelling far afield to compare American institutions with those of other nations, seem as yet to be strangely unconscious of the fact that on the border of their own country there lies another great Confederation, of origin more similar in many respects to their own than any other, but which in the plan and methods of its polity, might furnish them with many notable contrasts. Mr. Woodrow Wilson, however, in his work on The State,[1] devotes a page and a half to the Dominion of Canada, and calls its Government "a very faithful reproduction of the Government of the Mother Country."[2] In this he is, I think, more accurate and more just than Mr. Dicey, who first said, in his haste, that the framers of the preamble of the British North America Act were guilty of "official mendacity"[3] in intimating that the Canadian provinces were to be federally united 'with a Constitution similar in principle to that of the United Kingdom,' and after fuller deliberation, only reduced the charge to one

Professor Dicey and the preamble of the B.N.A. Act.

[1] Boston, 1890.

[2] At p. 442.

[3] Article on Federal Government in *Law Quarterly Review*, Vol. 1, at p. 93; also The Law of the Constitution, 3rd ed., at p. 155.

of "diplomatic inaccuracy,"[1] to which he still adheres.[2] In truth, when one remembers Sir Henry Wotton's description of an ambassador as "an honest man sent to lie abroad for the Commonwealth," the modification in the charge made seems a very slight one.

In the last two editions of his brilliant lectures on the Law of the Constitution, Mr. Dicey concedes to his Canadian critics that "if we compare the Canadian Executive with the American Executive, we perceive at once that the Canadian Government is modelled on the system of parliamentary Cabinet Government as it exists in England, and does not in any wise imitate the presidential Government of America," (which, indeed, is the only point to which Mr. Woodrow Wilson specifically refers), but he adheres to the statement that "it is clear that the Constitution of the Dominion is in its essential features modelled on that of the Union," for that, "if we look at the federal character of the Constitution of the Dominion we must inevitably regard it as a copy, though by no means a servile copy, of the Constitution of the United States."[3] *Impar congressus Achilli*, I deny that it can with fairness and accuracy be called in any sense a copy of the Constitution of the United States at all.

Professor Dicey's view disputed.

It is, of course, perfectly true that the British

[1] The Law of the Constitution, 4th ed., at p. 156, (1893).

[2] *Ibid.*, 5th ed., at p. 157, (1897).

[3] *Ibid.*

North America Act "has, like the Constitution of the United States, federally united several communities, before the union having separate Governments and separate parliaments, ruling and legislating independently of each other, and without reference to each other's interests,"[1] but when we examine its scheme and methods for attaining this end, we see many and fundamental divergencies from American ideas and institutions, in which the founders of Confederation faithfully followed by preference, and with much ingenuity, the principles of the British Constitution. The matter will, I think, prove to be well worth careful consideration.

Principles of the British Constitution.

As Mr. Dicey tells us, "the essence of the English Constitution is the unlimited authority of Parliament[2];" while one of the most recent of American writers says, "the fundamental principle of the United States is that the supreme law-making power resides in the people, and that whatever they fundamentally enact binds everywhere."[3] The principle of the British Constitution seems to be that good servants ought to be trusted, and so the Ministry of the day is trusted with seats in Parliament, and supreme direction and influence therein so long, but so long only, as it can command a ma-

[1] Per Harrison, C.J., in Leprohon *v.* City of Ottawa, 40 U.C.R., at p. 487, 1 Cart. at p. 645.

[2] The Law of the Constitution, 5th ed., at p. 131.

[3] Schouler's Constitutional Studies, State and Federal, (New York: 1897) at p. 174. Cf. Cooley's Constitutional Limitations, 6th ed., at p. 39. The Federal Constitution commences: 'We, the people of the United States . . . do ordain and establish this Constitution for the United States of America."

jority, while to Parliament are entrusted unreservedly the most fundamental institutions of the realm as much as the most unimportant, the mostsacred enactments of the statute book as much as the most insignificant. Distrust of legislatures, on the other hand, is a pervading and growing characteristic of American institutions, and in explanation of this difference between the two countries an American writer says:

Distrust of legislatures in the United States.

"In England the encroachments upon private right were made by the Executive, often supported by pliant judges; the great battle for private right and individual liberty was fought by the House of Commons, and when these were placed on a firm foundation, every Englishman instinctively regarded Parliament as the great bulwark against oppression. But in this country the danger to private right and individual liberty has been that legislatures influenced by popular passion and prejudice, or controlled by combinations of vicious men, should disregard everything that opposed their will."[1]

Division of governmental power in America.

"The theory of our Governments—State and National," says an American judge, delivering the judgment of the Supreme Court of the United States, "is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these Governments are all of limited and defined powers."[2] "With the (British) Parliament," says Judge Cooley, "rests practically the

[1] Treatise on the Law of Taxation, Federal, State and Municipal, by W. H. Burroughs (New York, 1877), p. 364, sec. 11.

[2] Per Miller, J., in Savings and Loan Association *v.* Topeka, 20 Wall., at p. 663.

sovereignty of the country, so that it may exercise all the powers of the Government if it wills so to do; while on the other hand the legislatures of the American States are not the sovereign authority, and, though vested with one branch of the sovereignty, they are, nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by implication, which are equally imperative."

Restrictions on the powers of Congress.

And so the Constitution of the United States, while it gives Congress power to lay and collect taxes, duties, imposts and excises, not only provides that this must be 'to pay the debts and provide for the common defence and general welfare of the United States,'[2] but, also, prescribes that 'all duties, imposts and excises shall be uniform throughout the United States,'[3] and that 'no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.'[4] It gives Congress power 'to regulate commerce with foreign nations, and among the several States,'[5] but at the same time provides that 'no preference shall be given by any regulation of com-

[1]Cooley, *Ibid.* at p. 102.

[2]Article 1, section 8 (1). As to this limitation, see Story on the Constitution, 5th ed., Vol. 1, p. 663.

[3]Article 1, section 8 (1). Remarkable examples of what the requirement of equality and uniformity in taxation is held to involve in respect to restricting the action of the legislature will be found in Cooley, *Ibid.* at pp. 608, n., 618 n.

[4]Article 1, section 9 (4).

[5]Article 1, section 8 (3).

merce or revenue to the ports of one State over those of another.'[1] It further provides that 'no title of nobility shall be granted by the United States,[2]—that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble,'[3]—that the right of the people to keep and bear arms shall not be infringed,[4] and that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.'[5] It also contains several restrictions upon State legislative power, "a portion of them designed to prevent encroachments upon the national authority, and another portion to protect individual rights against possible abuse of State powers."[6] Thus it provides that no State shall 'make anything but gold or silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts;'[7] nor shall any person 'be deprived of life, liberty or property, without due process of law[8];'

Restrictions on State legislatures.

[1] Article 1, section 9 (6).

[2] Article 1, section 9 (8).

[3] Amendments, Article 1.

[4] Amendments, Article 2.

[5] Amendments, Article 6.

[6] Cooley's Constitutional Limitations, at p. 23.

[7] Article 1, section 10 (1).

[8] Amendments, Articles 5 and 14.

nor shall 'the right of citizens of the United States to vote be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude.'[1]

The separate State Constitutions.

The above will suffice to illustrate the restrictions placed upon legislative power in the United States by the Federal fundamental law. But it is to be observed that the legislatures of each separate State are also bound by the provisions of the Constitution or fundamental law of their own State, largely modelled on the Federal instrument,[2] and on the frequent occasions of amending their State Constitutions, the people of the several States shew an increasing tendency to seize the opportunity to make laws for themselves in their own way.[3] They "take subjects which belong to ordinary legislation out of the category of statutes, place them in the

[1]Amendments, Article 15. The only restrictions on legislative power at all analogous to be found in the British North America Act are in section 18, restricting the Dominion parliament in respect to defining the privileges, immunities and powers to be held, enjoyed and exercised by the Senate, and by the House of Commons and the members thereof, in sections 96-99, as to the appointment of judges, and in section 121, which enacts that all articles of the growth, produce or manufacture of any one of the provinces shall, from and after the Union be admitted free into each of the other provinces.

[2]"Scarcely a State in the whole enlarged Union can be named at the present day whose fundamental law does not pattern after that immortal instrument," (the Federal Constitution), "in one detail or another:" Schouler's Constitutional Studies, at p. 203.

[3]Bryce's American Commonwealth (2 vol. ed.), Vol. 1, p. 451. "There are at the present day forty-five full-fledged States in the American Union as against the thirteen that originally composed it; and of that number very few can be named more than fifty years old, whose Constitution has not been repeatedly recast in Convention and rewritten. A computation made in 1885 by a careful historical scholar shewed among other statistics that four States,—Georgia, South Carolina, Texas and Virginia—had each lived under five successive Constitutions, while Louisiana adopted her sixth Constitution in 1879. These figures did not include changes in those States that might have taken place during the Civil War": Schouler, *ibid.* at p. 204.

Constitution, and then handle them as part of this fundamental instrument."[1]

Thus, for example, Von Holst says: "The power to pledge the means or credit of a State in any wise whatsoever, for a corporation is either strictly limited or entirely denied. Some Constitutions go still further. They seek generally to keep the State aloof from all matters in which considerable sums are to be spent in a manner which might offer people with easy consciences and dexterous as well as covetous hands a good opportunity to fill their own pockets out of the public purse. Several Constitutions absolutely prohibit the States undertaking such works of general utility as are called in the United States 'internal improvements.' Others refuse the power to contract debts in this behalf. . . . It is evident not only from the formal precautions already mentioned, but also from many other constitutional provisions, that the idea prevails that a legislature must be approached with a certain amount of distrust."[2] In 1818, Illinois provided by fundamental law of the State that commons should be reserved for ever to the people, meaning by commons, lands that were once granted in common in any town or community by competent authority[3]; and the same State in its Constitution adopted in 1870, embodied among its fundamental laws regula-

Restrictions on legislative power in the State Constitutions.

[1] Bryce, *ibid.* p. 450. Cf. Lowell's Governments and Parties in Continental Europe, Vol. 2, at p. 293.

[2] Constitutional Law of the United States, p. 276-7.

[3] Schouler's Constitutional Studies, p. 222.

tions as to warehouses for storing grain.[1] "Minnesota, just before 1860," says Mr. Schouler, "set an organic rule relative to lending the credit of the State to certain railroads; and wearied of recent experience in mingling State liability with private enterprises, we see various States prohibiting thenceforward all debts of that character."[2] "The brief constitutional text applicable to legislative action in the earlier instruments," says the same writer, "importing great confidence in the discretion of the people's representatives, ceases forever to characterize these written fundamental ordinances. . . . We see communities as the efficient principals binding public agents by their own fundamental rules and cutting down credentials, as though deference to statesmanship were at an end. Instead of looking up to the legislature as the arcanum of fundamental liberties, we see the people inclining rather to Governors and the Courts as a needful corrective upon legislatures tempted to go astray."[3]

Restrictions on legislative power in the State Constitutions.

[1] Munn *v.* Illinois, 94 U.S. 113, referred to also in Dicey's Law of the Constitution, 5th ed., at p. 146, n. 1.

[2] Schouler, *ibid.* at p. 265.

[3] *Ibid.* at pp. 258-9. Speaking of a Kentucky statute passed to compel the owners of wild lands to make certain improvements upon them within a specified time, and declaring them forfeited to the State if its provisions were not complied with, Judge Cooley says, in words which well bring out how entirely different the American conception of the position of a legislature and of legislative power is from the English and the Canadian: "It would be difficult to frame, consistently with the general principles of free government, a plausible argument in support of such a statute. It was not an exercise of the right of eminent domain, for that appropriates property to some specific public use on making compensation. It was not taxation, for that is simply an apportionment of the burden of supporting the Government. It was not a police regulation, for that could not go beyond preventing an improper use of the land with reference to the due exercise of rights and

Nor are the restrictions on legislative power in the United States only those expressed in Federal or State Constitutions. Many exist which rest only on implication, and we find the Courts and text-writers, when discussing the validity of statutes, referring to "the general spirit of the Constitution,"[1] "certain foundation principles of the law of the land,"[2] "fundamental principles of justice,"[3] "natural rights,"[4] "inseparable incidents to republican government,"[5] "consistency with regulated liberty,"[6] "the essential nature of all free Governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all Governments entitled to the name."[7] The learned judge from whose judgment the last quota-

Implied restrictions on legislative power in the United States.

enjoyment of legal privileges by others. It was purely and simply a law to forfeit a man's property if he failed to improve it according to a standard which the legislature had prescribed. To such a power if possessed by the Government, there could be no limit but the legislative discretion," and he cites a Kentucky case where the Act was held to be unconstitutional : Constitutional Limitations, 6th ed., at p. 475.

[1] Von Holst's Constitutional Law of the United States, at pp. 147-8.

[2] *Ibid.* at p. 252.

[3] Gebhard *v.* Canada Southern R. W. Co., 17 Blatchf. at p. 419, (1880). For S. C. in App. see 109 U.S.R. 527.

[4] *Ibid.* "A declamatory speaker (Randle Jackson, counsel for the East India Company), who despised all technicalities, and tried to storm the Court by the force of eloquence, was once, when uttering these words, 'In the book of nature, my Lords, it is written—,' stopped by this question from the Chief Justice, Lord Ellenborough, 'Will you have the goodness to mention the page, sir, if you please' :" Lord Campbell's Lives of the Chief Justices of England, vol. 3, pp. 238-9.

[5] Cooley's Constitutional Limitations, 6th ed., at p. 207.

[6] *Ibid.* at p. 343.

[7] Per Miller, J., in Savings and Loan Association *v.* Topeka, 20 Wall. at p. 663. Cf. Story on the Constitution, 5th ed., Vol. 2, pp. 272-4, 699.

tion is taken goes on to shew that among these is the limitation of the right of taxation, that it can only be used in aid of a public object, an object which is within the purpose for which Governments are established.[1] And to give one other illustration, speaking of the control possessed by the legislative authority of the State over municipal corporations, Judge Cooley adds:—"There are nevertheless some limits to its power in this regard, as there are in various other directions limits to the legislative power of the State. Some of these are expressly defined; others spring from the usages, customs and maxims of our people; they are a part of its history, a part of the system of local self-government, in view of the continuance and perpetuity of which all our Constitutions are framed, and of the right to which our people can never be deprived except through express renunciation on their part."[2]

Implied restrictions on legislative power in the United States.

[1] Cooley, *ibid.* p. 267, n., cites a Maine decision holding that the raising of money by tax in order to loan the same to private parties to enable them to erect mills and factories, was raising it for a private purpose, and therefore illegal. "An unlimited power to make any and everything lawful which the legislature might see fit to call taxation, would be, when plainly stated, an unlimited power to plunder the citizen:" Cooley, *ibid.* at p. 599. At another place (*ibid.* p. 483), Judge Cooley quotes words from Locke on Civil Government (sec. 142) that those who make laws "are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court and the countryman at plough," and says: "This is a maxim in constitutional law, and by it we may test the authority, and binding force of legislative enactments," and he cites a number of decisions of various State Courts, and amongst them a West Virginia case where it was held that miners and manufacturers alone cannot be forbidden to pay in store orders, and a Michigan case where it was held that recovery against newspaper publishers for libel cannot be limited to actual damage provided a retraction is published and the libel was published in good faith, as is enacted, it may be added, by Revised Statutes of Ontario, 1887, c. 57, s. 5, (2). Cf. Imp. 6-7 Vict. c. 96, s. 2.

[2] *Ibid.* at p. 281. Cf. Story on the Constitution, 5th ed., Vol. 1, at p. 204, n.

Separation of governmental powers.

And the same distrust of those who exercise public authority, which we see exhibited in the restrictions placed upon legislatures in the United States, is illustrated likewise by the careful separation made by Federal and State Constitutions in that country of executive power from legislative power, and of judicial power from both. "One of the most noticeable features in American Constitutional law," says Cooley, "is the care which has been taken to separate legislative, executive and judicial functions. . . The different classes of powers have been apportioned to different departments, and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others."[1]

Separation of Executive from legislature in the United States.

The Federal Constitution provides that 'no person holding any office under the United States shall be a member of either House during his continuance in office,'[2] and thus renders impossible that system of responsible parliamentary government which has already been referred to, and which exists alike in the United Kingdom and in Canada.[3] And the

[1] *Ibid.* at p. 104.

[2] Article 1, section 6.

[3] It would be out of place here to discuss the comparative merits of the British and American systems in this matter. A stronger argument could hardly be made in favour of the British system than that by an American writer already referred to, Mr. Woodrow Wilson, in his Congressional Government, Boston, 1887. See, also, Bryce's American Commonwealth, (2 vol. ed.) Vol. 1, at pp. 287, 303; Story on the Constitution, 5th ed., Vol. 1, pp. 635-6; Bagehot's English Constitution, 5th ed., pp. 65-6. "The efficient secret of the English Constitution," says Bagehot, "may be described as the close union, the nearly complete fusion, of the executive and legislative powers:" *Ibid.* at p. 10.

same separation of Executive from legislature exists in the separate States. "In the separate States," Von Holst says, "even more than in the Federal Government, parliamentary government, in the European sense of the word, is something entirely foreign to American constitutional and general law."[1] "The executive head of the United States Government," writes another American author, "is completely independent of the legislature as to his political policy. His council or cabinet of advisers are his own agents, responsible politically to him only. The defeat of a proposition made by him, or by any one or all of them, to the legislature, or a vote of censure passed by the legislature upon him or them, do not call for his resignation or their resignations. Nothing of the sort is provided or intimated in the remotest degree in the Constitution. The political independence of the Executive over against the legislature is complete."[2] And we cannot pass on to the subject of the separation of judicial power from either executive or legislative better than by citing the following passage from Mr. Schouler's book: "The very fact that Congress has such power for enacting momentous laws unwisely renders it all the more desirable that the President should have a counteracting influence like some tribune of the people. Another strong bulwark

Position of the President.

[1] Constitutional Law of the United States, at p. 269.

[2] Political Science and Comparative Constitutional Law, by John W. Burgess, Boston, 1891, at pp. 19-20. Cf. Cooley's Constitutional Limitations, 6th ed., at p. 136.

against the tyranny of either Congress or the President, another grand popular reliance will next appear in the federal judiciary, and most of all in the Supreme Court."[1]

Separation of judicial from legislative power in the United States.

The theory of the separation of judicial from legislative power is carried so far among the Americans that a few examples may well be mentioned here. Under decisions of several States, a legislative Act directing the levy and collection of a tax which has already been declared illegal by the judiciary is void, as an attempted reversal of judicial action.[2] Under a Tennessee decision a legislative resolve that no fine, forfeiture or imprisonment should be imposed or recovered under the Act of 1837 (then in force), and that all causes pending in any of the Courts for such offences should be dismissed, was held void as an invasion of judicial authority.[3] So, likewise, the Supreme Court of New Jersey held that a statute which provided that no judgment of the Supreme Court should be reversed by the Court of Errors and Appeal unless a majority of those members of the Court who were competent to sit on the hearing and decision should concur in the reversal, was unconstitutional, as its effect would be, if the Court were not full, to make the opinion of the minority in favour of affirmance control that of the majority in favour of reversal, unless the latter were a majority of the whole

[1] Constitutional studies, at p. 168.

[2] Cooley's Constitutional Limitations, 6th ed., at p. 113, n. 1.

[3] *Ibid.* p. 114, n. 1.

Court.[1] In the opinion of New Hampshire Judges the legislature cannot authorize a guardian of minors by a special Act or resolve to make a valid conveyance of the real estate of his wards[2]; while in Massachusetts a statute validating proceedings had before an intruder into a political office before whom no one is authorized or required to appear, and who could have jurisdiction neither of the parties nor of the subject matter, has been held void as an exercise of judicial power."[3] "The (Federal) judiciary," says Mr. Dicey, "stand on a level both with the President and with Congress, and their authority (being directly derived from the Constitution) cannot, without a distinct violation of law, be trenched upon either by the Executive or by the legislature."[4] And when one considers the strong position in which the judiciary are thus placed, reinforced by the constitutional provisions everywhere found which provide that no person shall be deprived of life, liberty or property without due process of law, and the vague generalities on which, as has been seen, the American system permits Courts to found decisions as to the validity of legislative enactments, it is not surprising that Mr. Burgess should call the governmental system of the United States "the aristocracy of the robe[5];" or

Separation of judicial from legislative power in the United States.

[1] *Ibid.* at p. 115, n. 1.

[2] *Ibid.* at p. 121, n.

[3] *Ibid.* at p. 127.

[4] Article on Federal Government in the *Law Quarterly Review*, Vol. 1, at p. 86.

[5] Political Science and Comparative Constitutional Law, at p. 365.

to read in Mr. Dicey's pages that "the Constitution of the United States as it actually exists rests to a very considerable extent on judge-made law."[1]

Now, whether this separation of legislative, judicial and executive authority in the nation or State, whether these fundamental provisions and restrictions, this complicated system of checks and balances, be wise or not wise, is not the point here in question, but I cannot refrain from quoting Judge Cooley's words upon what is perhaps the most important of all the restraints on legislation, namely, that the obligation of contracts must not be impaired.[2] This restriction, it must be said, though only expressed in the Federal Constitution to apply to State legislatures, is held nevertheless to apply to Congress, on the ground that so to legislate is not among the powers granted to that body.[3] It was decided, it will be remembered, in the famous case of Dartmouth College *v.* Woodward,[4] that

The American restriction against impairing obligation of contracts.

[1] The Law of the Constitution, 5th ed., at p. 399, n.

[2] "This apparently simple clause, which was hardly mentioned in the debates over the adoption of the Constitution, has proved to be one of the most important, has given occasion to as many legal controversies, perhaps, as all the rest of the Constitution put together, and has laid the heaviest tasks upon judicial brains:" Von Holst's Constitutional Law of the United States, pp. 231-2. See also, as to it, Story on the Constitution, 5th ed., Vol. 2, at p. 246. Remarkable examples of the degree to which it restrains legislative action will be found in Cooley's Constitutional Limitations, 6th ed., at pp. 352, 354-5. It would seem from what is there stated that whatever the law is bearing on the subject matter of a contract at the time the contract is entered into, it can never be altered so as to affect, even indirectly, the rights accruing by the contract, and the legal position of the parties in respect to the enforcement thereof.

[3] Von Holst, *ibid.* at p. 231. See, also, *infra* p. 286.

[4] 4 Wheat. 518, (1819). In this case the charter was one from the British Crown to the trustees of Dartmouth College, granted in the year 1769.

charters of incorporation, except those of a municipal character, were contracts between the State and the corporations within the meaning of that restriction, and Judge Cooley says, with reference to that case: "It is under the protection of the decision in the Dartmouth College case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretence—being made inviolable by the Constitution, the Government is frequently found stripped of its authority in very important particulars by unwise, careless or corrupt legislation; and a clause of the Federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil."[1] However this may be, Mr. Dicey calls attention to sundry great and recent legislative measures passed in England which would have been rendered impossible had the British system recognized such a restriction, saying: "If any principle of the like kind had been recognized in England as legally binding on the Courts, the Irish Land Act would have been unconstitutional and void;

The British system contrasted as to impairing contracts.

[1] Cooley's Constitutional Limitations, 6th ed., at p. 335, n. For a spontaneous recognition by the Supreme Court of the United States of the superior position the Dominion parliament is in for legislating wisely and justly in certain cases by reason of the absence of any such constitutional prohibition in their case, see Gebhard *v.* Canada Southern R.W. Co., 109 U.S., at p. 535, 538-9, (1883).

the Irish Church Act, 1869, would, in great part at least, have been from a legal point of view so much waste paper, and there would have been great difficulty in legislating in the way in which the English parliament has legislated for the reform of the Universities. One maxim only among those embodied in the Constitution of the United States would, that is to say, have been sufficient if adopted in England to have arrested the most vigorous efforts of recent parliamentary legislation."[1]

British principles in the Dominion Constitution

The hampering and restricting of legislative action by such provisions of a fundamental law as we have been considering is, and was in 1867 when the British North America Act was framed, whether wise or unwise, quite foreign to the principles of the Constitution of the United Kingdom, which guards the liberty of the subject without destroying the freedom of action of the legislature. The framers of that Act could not of course create a legislature precisely similar to the British parliament in respect to supreme control over all matters whatever in Canada, because they were bringing into existence not a legislative union but a federal union of the provinces. But they adhered as closely as possible to the British system in preference to that of the United States. They distributed all legislative power whatever over the internal affairs of the Dominion between the Federal parliament on the one hand, and the provincial legislatures on the other. They gave them not

[1]The Law of the Constitution, 5th ed., at pp. 165-6. Cf. a similar passage in Bryce's American Commonwealth, (2 vol. ed.), Vol. 1, p. 308.

merely powers to do certain things and make all laws necessary and proper for carrying such powers into execution, as is the case with Congress, but power to 'make laws in relation to' the various subject matters of legislation committed to their respective jurisdictions.[1] They gave them that power in each case not as mere delegates or agents,[2]—not subject to all manner of fundamental restrictions, but authority as plenary and as ample within the limits prescribed as the Imperial parliament, in the plenitude of its power, possessed and could bestow. They recognized no reserve of power either in the people of the Dominion at large, or in the people of the provinces in particular.[3] Between the Dominion parliament and the provincial legislatures was distributed all power whatever over the government of the internal affairs of the country in every respect. Too much must not be made of the supposed difference between the United States Constitution and that of the Dominion, that under the former the residue of legislative

British principles in the Dominion Constitution.

[1] See per Spragge, C., in Regina *v.* Frawley, 7 O.A.R. at p. 270, 2 Cart., at p. 592.

[2] "The sovereign power resides indeed in the people. . . The exercise of sovereign power has been given in part to the Federal Government, and in part retained for the States. Congress, on the one hand, and the legislatures on the other (together with the Executive and the judiciary), are called into existence by the sovereign to assist in carrying out the various purposes to be accomplished. They are the people's 'substitutes and agents,' as the Constitution of Massachusetts has it:" note to Story on the Constitution, 5th ed., Vol. 2, p. 567. "The Federal and State Governments are in fact but different agents and trustees of the people, constituted with different powers, and designated for different purposes:" *The Federalist*, No. 46, at p. 292, (Knickerbocker Press ed.). See, also, *infra* pp. 245-50, 689-700.

[3] See per Palmer, J., in the Queen *v.* The Mayor etc., of Fredericton, 3 P. & B. at p. 143.

power is 'reserved to the States respectively, or to the people,'[1] while in the latter it is given to the Dominion parliament. Faithful to the British model, the framers of the British North America Act did, it is true, give the Dominion parliament general power to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. That was necessary in order to round off and complete the powers of the Dominion parliament over federal matters, making it thus,—not like Congress,—but like the parliament of the United Kingdom so far as all such matters are concerned.[2] But in like manner they rounded off and completed the power of the provincial legislatures over provincial matters, giving them likewise a residuary power over 'generally all matters of a merely local or private nature in the province.'[3]

British principles in the Dominion Constitution.

Furthermore and still adhering to British principle, the framers of the Dominion Constitution made the respective powers of Parliament and provincial legislatures, not concurrent, but exclusive in each case the one of the other, thus making the parliamentary

[1] Amendments, Article 10.

[2] See per Gwynne, J., in City of Fredericton *v.* The Queen, 3 S.C.R., at pp. 563-4, 2 Cart. at p. 56.

[3] Section 92, No. 16, British North America Act. See *infra* pp. 342-3, 651-61, 711-2. Mr. Schouler speaks of two States of the Union superseding "that tumultuous assembly of a single House . . . by a truly American legislature of two branches:" Constitutional Studies, at p. 205. All the State legislatures now consist of two Houses. The provinces of Ontario and Manitoba have each a single House only.

bodies they were creating each supreme in its own domain, though in the case of direct conflict of legislative enactment, Dominion legislation, if *intra vires*, will place in abeyance that of a province.[1] In the United States it is quite otherwise. The powers of Congress are not expressed to be given to Congress exclusively, and are not construed as exclusive, "unless from the nature of the power, or from the obvious results of its operations, a repugnancy must exist, so as to lead to a necessary conclusion that the power was intended to be exclusive," otherwise "the true rule of interpretation is that the power is merely concurrent."[2]

British principles in the Dominion Constitution.

Again, they no more separated the judicial or executive power from the legislative so far as concerns the internal affairs of Canada and Canadian Courts, than they are separated in the United Kingdom. They gave the provincial legislatures exclusive power over the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and criminal jurisdiction, and to the Dominion parliament exclusive power over criminal law, and procedure in criminal matters. They did not prohibit members of the Dominion Cabinet or of provincial Executive Councils being members of the legislature during their continuance in office, and so preserved the British system of responsible government in

[1] See *infra* pp. 347-64, 663-70.

[2] Story on the Constitution, 5th ed., Vol. 1, p. 335.

Dominion and province alike.[1] In framing a fundamental law for the Dominion they restrained their hands,[2] and allowed as free scope as in the nature of the case was possible for that process of organic growth of the Constitution coincidently with the organic growth of the nation, which is one great virtue of the Constitution of the United Kingdom; and they did their best to secure to Canadians as a heritage for ever the precious forms of British liberty. The preamble of the British North America Act embodies neither "official mendacity" nor "diplomatic inaccuracy," but the simple truth, in intimating that in its federal character the Constitution of the Dominion is similar in principle to that of the United Kingdom.

Applicability of American decisions as to legislative power.

Nevertheless the British North America Act resembles the Constitution of the United States in that it unites in federation what were formerly separate colonies of Great Britain, with a federal legislature for federal matters, and local legislatures for the domestic affairs of each component party to the federation, and so there may be very naturally a tendency among us in Canada, as a Quebec Judge says, "*jeter les yeux d'abord chez nos voisins*,"[3] to

[1] See sections 65, 83, and 88 of the British North America Act.

[2] "The very inflexibility of the Constitution tempts legislators to place among constitutional articles maxims which (though not in their nature constitutional) have special claims upon respect and observance. . . Other federal Constitutions go far beyond that of the United States in inscribing among constitutional articles either principles or petty rules which are supposed to have a claim to legal sanctity; the Swiss Constitution teems with 'guaranteed' rights:" Article on Federal Government in the *Law Quarterly Review*, Vol. 1, at pp. 86-7, by A. V. Dicey.

[3] Per Jette, J., in Lambe *v* Fortier, R.J.Q., 5 S.C., at p. 358.

see how their Courts have dealt, if at all, with such questions of legislative power as arise with us. And therefore it may be worth our while to endeavour to ascertain with as much accuracy as possible how far the distribution of subject matters of legislation between Congress and the States, resembles that between the Dominion parliament and the provincial legislatures, and so arrive at a conclusion as to what hope there may be of deriving assistance from the decisions of American Courts. Now, in the first place, we may at once discard as useless for our purposes the great mass of American constitutional case law dealing with questions arising under the separate State Constitutions, and which is so ably treated of in Judge Cooley's work on Constitutional Limitations, and also all that other great mass dealing with the interpretation and scope of those fundamental restrictions on legislative power under the Federal Constitution which have been referred to, such as that against impairing the obligation of contracts. Apart from this, even if the clauses granting powers to Congress were identical in wording with the various clauses of section 91 of the British North America Act enumerating Dominion powers, it would still be necessary to remember, in the first place, that our provincial legislatures have also specific grants of legislative powers over various broad subject matters, which powers they hold by exactly the same title as the Dominion Parliament holds its powers,[1] so that the

Applicability of American decisions as to legislative power.

[1] It is easy to see that the gift to the Dominion parliament of a general residuary power to make laws for the peace, order, and good government of Canada, rendered expedient the specification of various

two sets of powers have to be reconciled with each other, and the whole Act has to be read together, whereas under the United States Constitution the only powers granted are those granted to Congress; and all powers not granted to it, nor prohibited to the States, are reserved to the States respectively or to the people, as has been already pointed out. It is obvious that the necessity of reconciling the double enumeration of powers, the one with the other, in the case of the Dominion Constitution, might in many cases make the interpretation of the Federal powers different and more circumscribed than they would be if they stood alone. Moreover, it would still be necessary, also, to ascertain and remember the scope of the general residuary power of the Dominion parliament to make laws for the peace, order, and good government of Canada,[1] which has already been referred to, and nothing similar to which is granted to Congress.[2]

Problems peculiar to Dominion system.

To interpret the Dominion exclusive power to make laws in relation to the regulation of trade and commerce, in view of the provincial exclusive power over property and civil rights in the province, and over shop, saloon, tavern, auctioneer and other licenses,—

provincial powers, while to ensure there being no dispute as to the right of the Dominion parliament to exercise the more important Federal powers, it was necessary to specify these also. See, also, *infra* pp.663-71.

[1] As to it see *infra* pp. 310-38.

[2] The Government of the United States is one of enumerated powers: Cooley's Constitutional Limitations, 6th ed., at p. 11. "This specification of particulars evidently excludes all pretension to a general legislative authority:" *Federalist*, No. 83, cited Story on the Constitution, 5th ed., Vol. 2, at p. 545, n. Cf. per Matthieu, J., in The Export Lumber Co. *v.* Lambe, 13 R. L., at p. 93.

to interpret the exclusive provincial power over property and civil rights in the province, in view of the exclusive Dominion power over interest, and bankruptcy and insolvency,—to interpret the Dominion exclusive power over the criminal law[1] in view of the exclusive provincial penal power for enforcing laws of the province,—these are problems which have given plenty of work to Canadian Courts, but of a character which do not arise under the Constitution of the United States. And, indeed, it appears that comparatively a very small part of American constitutional law is concerned with any questions of the relative powers of Congress and the separate States.

Powers of Congress compared with those of Dominion parliament.

But as a fact the grants of power to Congress are by no means identical in their wording with those to the Dominion parliament,[2] and those of them which can be said to be similar in wording, or obviously embraced by and included in Dominion powers, are all of them such as, standing alone as they do in the Constitution of the United States, give rise to little or no difficulty of interpretation, and seem to have been seldom before the Courts. I refer to the powers to borrow money on the credit of the United States, to establish a uniform rule

[1] On the second reading of the British North America Bill in the House of Lords, Lord Carnarvon said of this Dominion power over criminal law:—"In this I cannot but note a wise departure from the system pursued in the United States, where each State is competent to deal as it may please with its criminal code, and where an offence may be visited with one penalty in the State of New York, and with another in the State of Virginia. The system here proposed is, I believe, a better and a safer one:" Hansard, 3rd Series, Vol. 185, p. 564. And cf. Debates on Confederation, at p. 41. Note, also, the important Dominion power over marriage and divorce. And see, *infra* pp. 548-9.

[2] And so per Caron, J., in Dubuc *v.* Vallée, 5 Q.L.R., at p. 35.

of naturalization and uniform laws on the subject of bankruptcies throughout the United States, to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures, to provide for the punishment of counterfeiting the securities and current coin of the United States, to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries, to constitute tribunals inferior to the Supreme Court, to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, to declare the punishment of treason, to admit new States into the Union, and to dispose of and regulate the territory or other property belonging to the United States. To these we may add, so far as the relation of the Dominion to the Empire requires or allows the Dominion parliament to be concerned with such matters, the power to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, and to provide for organizing, arming and disciplining the militia.

Powers of Congress compared with those of Dominion parliament.

These grants of power to Congress no doubt resemble more or less closely or are obviously included within the grants of power to the Dominion parliament in the British North America Act, but it will be seen that they present no serious difficulty of interpretation, there being no exclusive grants of power to the States to be reconciled with them. There only re-

main six other powers granted to Congress. The first, which is to lay and collect taxes, duties, imports and excises, is, as has already been pointed out, granted subject to certain restrictions which alone create any difficulty in its interpretation, and which have no parallel in the case of the Dominion parliament; the next is to regulate commerce with foreign nations, and among the several States and with the Indian tribes, which has been the subject of a multitude of legal decisions, but the interpretation of which can obviously throw little light on that of the far wider Dominion power to make laws in relation to the regulation of trade and commerce, especially supplemented as the latter is by the other Dominion powers over navigation and shipping, banking, bankruptcy and insolvency, and other matters with which trade and commerce are mainly concerned. Then comes a power granted to Congress over post offices and post roads, upon the interpretation of which some doubt has arisen, which has not arisen in reference to the Dominion power over postal service, possibly because the latter is supplemented by the general residuary Dominion power already spoken of. The next power granted to Congress and not already noticed, namely, that of declaring war, granting letters of marque and reprisal, and making rules concerning captures on land and water, concerns matters in our case pertaining to the Imperial Government. There only remains the power granted to Congress to exercise exclusive legislation in all cases whatsoever over such district (not exceed-

Powers of Congress compared with those of Dominion parliament.

ing ten miles square) as might become the seat of the Government of the United States, and over places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings, and the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

The conclusion of the matter.

So that on the whole comparison, Taschereau, J., seems abundantly justified in saying, as he did in one case, that "the relative positions of the parliament of the Dominion of Canada, and the legislatures of the various provinces, are so entirely different from those of Congress and the legislatures of the several States, that all decisions from the United States Supreme Court, though certainly always entitled to great consideration, must be referred to here with great caution[1];" and Fournier, J., in saying "if there be in many respects an analogy between the two countries, there is certainly none whatever in the mode adopted for the distribution of the legislative power[2]"; and Gwynne, J., in saying that "our Constitution, though of a federal nature, is totally different from that of the United States."[3]

[1] 4 S.C.R., at p. 299, 1 Cart., at p. 321.
[2] Valin *v.* Langlois, 3 S.C.R., at p. 55, 1 Cart. at 193.
[3] *In re* Niagara Election Case, 29 C.P. at p. 274.

The Law of Legislative Power in Canada.

PROPOSITIONS 1 AND 2.

1. The British North America Act is the sole charter by which the rights claimed by the Dominion and the Provinces respectively can be determined.

2. Although the British North America Act was founded upon the Quebec resolutions, and so must be accepted as a treaty of union between the provinces, yet when once enacted it constituted a wholly new point of departure, and established the Dominion and Provincial Governments with defined powers and duties, both alike derived from it as their source.

One constitutional charter.

The former of the above propositions is taken from the words of Gwynne, J., in Mercer *v.* The Attorney-General for Ontario,[1] and is of great

[1] 5 S.C.R. at p. 675, 3 Cart. at p. 56-7, (1881). The learned judge speaks in a similar manner in City of Fredericton *v.* The Queen, 3 S.C R. at p. 563, 2 Cart. at p. 55, (1880). And so, also, in Venning *v.* Steadman, 9 S.C.R. at p. 224, (1884), Henry, J., says:—"The authority of the Dominion government and the Dominion parliament is, as I take it, altogether under the Confederation Act."

Prop. 1-2

importance. Many of the propositions formulated in this book may be said to be corollaries from it; for example, that no consent or acquiescence of the Crown in the form of non-exercise of the veto power, or otherwise, can render valid an Act otherwise *ultra vires* and unconstitutional under the British North America Act,[1]—that no Colonial Secretary has *ex officio* a right by a despatch or otherwise either to add to, alter or restrain any of the legislative powers conferred by the Act, or to authorize a subordinate legislature to do so,[2]—that provincial legislatures have no powers excepting the enumerated powers which are given to them by the Act.[3]

Corollaries.

It follows also from it that, as indicated in the notes to Proposition 4, the state of legislation and the legislative powers exercised in the various provinces prior to Confederation can at most only be usefully referred to to throw light upon the language of the Imperial Act when that language is doubtful.

The second proposition.

The second Proposition might also be fairly said to be a corollary from the first. It is not taken in its entirety from any one judgment, but would appear to embody correctly the result of the authorities at the present time, although there are some dicta, as will be seen, opposed to it.

The Privy Council.

It would seem, however, from Bank of Toronto *v.* Lambe,[4] that the matter is one not yet argued out before the Privy Council. Their lordships say:—"It has been suggested that the provincial legislatures possess powers of legislation either inherent in them

[1] Proposition 11.

[2] Proposition 13.

[3] Proposition 66.

[4] 12 App. Cas. at p. 587-8, 4 Cart. at pp. 23, (1887).

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or dating from a time anterior to the Federation Act, and not taken away by that Act. Their lordships have not thought it necessary to call on the respondent's counsel, and, therefore, possibly, have not heard all that may be said in support of such views. But the judgments below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their lordships feel justified in expressing their present dissent on these points. . . . They adhere to the view which has always been taken by the Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the Parliament."[1]

Incline to view that B.N.A. Act exhaustive.

In moving the second reading of the British North America Act in the House of Lords, Lord Carnarvon said:—"To those resolutions" (*sc.*, the Quebec Resolutions) "all the British Provinces in North America were, as I have said, consenting parties, and the measure founded upon them must be accepted as a treaty of union."[2] And he also observed that, although, it was, of course, within the competence of Parliament to alter the provisions of the Bill, yet he would be glad for the House to understand that the Bill partook somewhat of the nature of a treaty of union, every single clause in it had been debated upon over and over again, and had been submitted to the closest scrutiny, and, in fact, each of them represented a compromise between the several interests involved.

Lord Carnarvon.

The B.N.A. Act a treaty of union.

What we have to deal with now, however, is the bearing of the Propositions under discussion upon the question of what are the proper and legitimate

Its interpretation.

[1] See Proposition 26 and the notes thereto.

[2] Hansard, 3rd Series, vol. 185, p. 558.

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methods to be applied in interpreting the provisions of the British North America Act.[1]

Per Henry, J.

In Mercer *v.* The Attorney-General for Ontario,[2] where the question before the Court was whether lands escheated to the Crown for defect of heirs belong to the province in which they are situate or to the Dominion, Henry, J., observes:—"Our attention was directed at the argument to the position of Canada immediately preceding the passage of the Act as regards Crown or waste lands, and also to that of Upper Canada before the union with Lower Canada. Holding, however, the views I do as to the result of the union of the four provinces in 1867, I am unable to feel that much, if any, weight should be given to an argument founded on the position, as touching the question under consideration, which the provinces or any of them occupied at any time before Confederation, except so far as the Act specially refers to such position. The Imperial Act was not one forced upon the provinces by an arbi-

Not to be founded on state of things before Confederation.

Save when referred to by it.

[1] In the argument in *In re* Portage Extension of the Red River Valley R.W., Cass. S.C. Dig., p. 487, (reported *in extenso* by Holland Brothers, Senate Reporters, Ottawa, printed by A. S. Woodburn, Ottawa, 1888), Mr. Mowat, who was of counsel in the case, said (at p. 62):—"In various cases that have been decided, I am not quite sure whether in this Court, or in other Courts, reference has been made to the resolutions upon which the British North America Act was founded. What degree of importance should be attached to them has not been stated, but at all events it is reasonable for judges to look at them, and, if they do find that they throw any light on the subject, they should avail themselves of that light. . . . The proceedings preliminary to the American constitution are frequently referred to in their Courts, and even their debates are referred to. We have no debates, because at the Conference the sessions were held with closed doors, and there has been no publication of what was said." But Ritchie, C.J., observes (p. 64):—"Are we to construe the Act of parliament with the resolutions? It shows that it was before the mind of the draughtsman, or those who negotiated this draft,—the understanding between the representatives of the different provinces in England at the time of the passing of the Act, and it appears that when it came to be put in binding form they most materially altered it. The inference is that they altered it advisedly." See, also, Clement's Canadian Constitution, at p. 219.

[2] 5 S.C.R. at p. 657-8, 3 Cart. at p. 43-4, (1881).

trary proceeding of an overruling legislative body, depriving them, or any of them, of legislative power. In such a case it might be contended that the extent of the deprivation must be ascertained from the Act; and as regards any subject or matter not embraced in it, the power would still remain. Here, however, the case is far different. The Act was passed, as it recites, on the application of the provinces to give legislative sanction and authority to an agreement entered into on the part of the provinces for their federal union. The implied, if not expressed, principle acted on was, that all rights and privileges, including legislative as well as others, of each of the provinces should be surrendered; and that each should, if the union were consummated, depend subsequently for the exercise of their rights and privileges upon the Imperial Act to be passed, to give effect to the agreement for union entered into. This is patent in the Act itself, and in the resolutions of the delegates upon which it was founded and passed. I could give many reasons, and show many facts, to prove the correctness of this proposition; but it appears to me only necessary to suggest that if it were intended to be otherwise, we would reasonably expect to find provision made for intended exceptions. The absence of any such is strong presumptive evidence that none were desired."

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Must look to Act alone for all rights.

And there seems to be a certain analogy between Henry, J.'s, view as thus expressed as to the principle acted on in the British North America Act and the view of Strong, J., in St. Catharines Milling and Lumber Co. *v.* The Queen,[1] where he says that the scheme by which the British North America Act carried out Confederation was "by first consolidating the four original provinces into one body politic,

Per Strong, J.

[1] 13 S.C.R. at p. 605, 4 Cart. at p. 134, (1887).

Prop. -2

—the Dominion,—and then redistributing this Dominion into provinces, and appropriating certain specified property to these several provinces," whence he argues that it follows that the residue of the property belonging to the Crown in right of the provinces before Confederation not specifically appropriated by the appropriation clauses of the Act, sections 109 and 117, to the newly-created provinces, must of necessity have remained in the Crown, and it is reasonable to presume for the use and purposes of the Dominion.[1]

The Act a redistribution of the Dominion into provinces.

And, if by "central government," and "central power," is to be understood "Imperial government," and "Imperial power," the words of Taschereau, J., in Attorney-General of Quebec *v.* Attorney-General of Canada,[2] would seem to accord with those of Henry, J., just cited. After stating that "there is only one sovereignty for the whole Dominion, and this sovereignty resides in the federal executive power," he adds:—"Before Confederation, each of the provinces was invested with this character of sovereignty; but in joining the federal union each of them made a full surrender to the central government of this sovereignty, with its privileges, prerogatives, and attributes, as also of the revenues proceeding from the exercise of said privileges, prerogatives, and

Per Taschereau, J.

The provinces surrendered their sovereignty.

And revenues.

[1]The conclusion thus arrived at by Strong, J., but little harmonizes with what counsel for the provinces in their argument before the Privy Council in that case (14 App. Cas. at p. 50, 4 Cart. at p. 113) asserted, apparently correctly, to be a feature of the British North America Act, viz., that, "as to legislative powers, it is the residuum which is left to the Dominion; as to proprietary rights the residuum goes to the provinces. Where property is intended to go to the Dominion, it is specifically granted, even though legislative authority over it may already have been vested in the Dominion."

[2]1 Q.L.R. at p. 181, 3 Cart. at p. 114, (1876).

attributes.[1] By the British North America Act, 1867, has been reconveyed to the separate provinces by the central power some of these rights and revenues, and only from such reconveyance can the provinces derive their right and title: Reg. *v.* Taylor, 36 U.C.R. 191." Prop. 1-2

However, in his pamphlet entitled Letters upon the Interpretation of the Federal Constitution, (first letter),[2] Mr. Justice Loranger says, at p. 40 :—" It is one of the points of the doctrine hostile to local powers that, in entering into Confederation, the provinces returned to the Imperial government all the rights theretofore possessed by them, as well as all their property, so that a new distribution thereof might be made between them and the Federal government. This doctrine, which exhibits the imagination of its inventors, does not, in an equal degree, show the solidity of their powers of reasoning, for not only do we not find one word in the resolutions of the conference, the parliamentary discussion, or the Union Act, which might be construed into such a voluntary renunciation of their autonomy by the provinces, but this supposition is contrary to all the political events which preceded, accompanied, and followed Confederation; it is altogether improbable, and we must say is repugnant to common sense." Contrary view of Loranger, J.

In the Thrasher Case[3] Crease, J., speaks as though the surrender had been to the Dominion parliament. Per Crease,

[1] In a speech of the Hon. Geo. Brown, in 1864, he said :—" There was one point to which he was desirous of calling particular attention, namely, to the fact that in framing their constitution they had carefully avoided what had proved a great evil in the United States, and that is the acknowledgment of an inherent sovereign power in the separate States, causing a collision of authority between the General and State governments, which, in time of trial, had been found to interfere gravely with the efficient administration of public affairs :" Gray on Confederation, p. 122.

[2] Quebec, 1884. See Proposition 64.

[3] 1 B.C. (Irving) at p. 199, (1882).

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He says:—"Everything the colony could give up, consistently with its Imperial allegiance, was vested absolutely in Canada, and redistributed or reserved to Dominion or Province respectively by the provisions of the British North America Act." He afterwards observes that perhaps he should substitute the word "merged" for "vested absolutely in Canada," and adds:—"The province had parted with all her rights in order to take some of them again in a different and (except when otherwise specifically prescribed) in a subordinate shape."

Provincial rights merged in Canada.

Per Gray, J.

And Gray, J.,[1] speaks in much the same way. The learned judges, however, were referring more especially to British Columbia, and it may be thought more accurate to speak of her surrendering her powers to the Dominion when entering Confederation than it would be to speak of the provinces first confederated having done so.

Per Spragge, C.J.

It cannot be disputed that, as pointed out by Spragge, C. J., in Hodge *v.* The Queen,[2] the effect of the British North America Act was more and other than a distribution of legislative power, it was an extinction of legislative power in regard to some subjects which, up to Confederation, had been subjects for provincial legislation. But it is easy to understand the point of view of Mr. Justice Loranger, in his pamphlet just referred to,[3] where he says:—"In the case of the Canadian confederation the provinces did not attribute to the federal government powers of a nature different from those that

The Act extinguished some provincial powers.

Loranger, J.'s view.

[1] 1 B.C. (Irving) at p. 224.

[2] 7 O.A.R. at p. 254, 3 Cart. at p. 169, (1882).

[3] At p. 44-5.

each before possessed. They delegated to it a portion only of their local powers to form a central power, that is to say, they allowed it the management of their affairs of a general character, but retained their own government for their local affairs. It was a concession of existing powers that was made to it and not a distribution of new powers. The powers of the central government came from the provinces, as those of an ordinary partnership come from the partners; to invert the order and state that the powers of the provinces come from the central government would be to reverse the natural order of things, place the effect where the cause should be, and have the cause governed by the effect." And in his Parliamentary Government in the British Colonies,[1] Mr. Todd says:—"For the purpose of enabling the central government to undertake the supreme authority of control and general legislation in and over the entire Dominion of Canada, the provinces agreed to surrender to the federal parliament the exclusive right to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned (by the British North America Act) exclusively to the legislatures of the provinces."

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The provinces conceded to the Dominion certain powers.

Mr. Todd's view.

However, with submission, the correct view in legal theory is indicated by the Propositions under discussion, namely, that neither does the Dominion parliament get its powers from the provinces, nor the provincial legislatures theirs from the Dominion, but both alike derive their powers from the Imperial parliament under the British North America Act.

The legal theory.

[1] 2nd ed., at p. 432.

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In Regina *v.* Hodge, in the Ontario Court of Queen's Bench,[1] Hagarty, C.J., uses words confirmatory of our leading Propositions, saying :—" The British North America Act completely rearranged our Constitution and established the Dominion and provincial governments with defined powers and duties ; " and in Leprohon *v.* The City of Ottawa[2] the same learned judge expressed the view that " we must take the Confederation Act as a wholly new point of departure. The paramount authority of the Imperial parliament created all the now existing legislatures, defining and limiting the jurisdiction of each. The Dominion government and the provincial governments alike spring from the same source." And in the same way, though not so strongly, in *Ex parte* Owen,[3] Weldon, J., says :—" The British North America Act is the commencement of a great change,—a new point of departure in our legislation takes place."

Per Hagarty, C.J.

The B.N.A. Act a complete rearrangement.

And a new departure.

Per Ramsay, J.

Acts of 1774 and 1791 have no direct bearing on B.N.A. Act.

In Bank of Toronto *v.* Lambe,[4] Ramsay, J., says :—" I do not hesitate to say that to pretend that the Acts of 1774 and 1791 have any direct bearing on the interpretation to be given to the

[1] 46 U.C.R. at p. 149, 3 Cart. 187, (1881). In an article on Federal Government in Canada, 9 C.L.T. at p. 220, Mr. Bourinot cites this dictum of Hagarty, C.J., and also that of Strong, J., in St. Catharines Milling and Lumber Co. *v.* The Queen, quoted *supra* pp. 5-6, but says :—" But by no reasoning from the structure of the Act can this contention which makes the provinces the mere creations of the statute, and practically leaves them only such powers as are specially stated in the Act, be justified. If it were so there must have been for an instant a legislative union, and a wiping out of all old powers and functions of the provincial organizations, and then a re-division into four provinces with only such powers as are directly provided in the Act." But besides the authorities cited in the notes to this Proposition, see also Proposition 66 and the notes thereto.

[2] 2 O.A.R. at p. 532, 1 Cart. at p. 604, (1878).

[3] 4 P. & B. (20 N.B.) at p. 490, (1881).

[4] M.L.R. 1 Q.B. at p. 168, 4 Cart. at p. 61, (1885), *sub nom.* 'The North British and Mercantile Fire and Life Ins. Co. *v.* Lambe.' But see the words of Mr. Justice Loranger, *infra* pp. 15-16.

British North America Act appears to me to be neither loyal nor honest." And in the City of Fredericton *v.* The Queen,[1] Gwynne, J., in the same way, in the course of his instructive judgment in that case, observes that the object of the British North America Act was by the exercise of sovereign Imperial power, called into action by the request of the then existing provinces of Canada, Nova Scotia and New Brunswick, to revoke the constitutions under which those provinces then existed, and, as the preamble of the Act recites, to unite them federally into one Dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom.[2]

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Per Gwynne, J.

The B.N.A. Act revoked the old constitutions.

And to refer again to the Thrasher Case,[3] Gray, J., there says:—"This Act has hitherto been considered by all Courts, all judges, all statesmen, and public men as a new departure in the Constitution of Canada, as well as of the several provinces forming the Dominion. The authorities are so numerous that the position may be assumed as a recognized axiom of constitutional law, when applied to Canada or its constituent parts." And he then quotes the words of Hagarty, C.J., above cited, in Leprohon *v.* The City of Ottawa.

So, too, per Gray, J.

A constitutional axiom.

And, lastly, some words of Holroyd, J., in the interesting Australian case of Musgrove *v.* Toy,[4] a case also alluded to in the notes to Proposition 9, are in point here. He says:—"Whatever measure

An Australian analogy.

[1] 3 S.C.R. at p. 560-1, 2 Cart. at p. 54, (1880).

[2] See, also, per Gwynne, J., in Mercer *v.* Attorney-General for Ontario, 5 S.C.R. at p. 711, 3 Cart. at p. 83-4, (1881).

[3] 1 B.C. (Irving) at p. 224, (1882).

[4] 14 V.L.R. at p. 428, (1888).

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of self-government has been imparted to the colony, we must search for it in the statute law, and collect and consolidate it as best we may. Nobody can have studied the development of self-government in the Australian colonies without having observed the tentative and cautious manner in which British statesmen have proceeded in their arduous task. The impulse which has warmed them into action has always been supplied from the colonies themselves. But we must not forget this, that it is the parliament of the United Kingdom, guided by the statesmen of the mother country, that has granted to this colony the whole measure of self-government which it possesses. It was the parliament of the United Kingdom which authorized Her Majesty to give the royal assent to the Constitution Act, and it is the intention of the parliament of the United Kingdom, as disclosed in the Constitution Act of which it approved, that we must set ourselves to discover."

Must discover the intent of the Imperial parliament.

Opposing dicta.

There are, however, dicta which may seem opposed to the views expressed in the leading Propositions. Thus in Bank of Toronto *v.* Lambe,[1] Jette, J., says :—" To reach a sound interpretation of our Constitution we must here, (*sc.*, in considering the British North America Act), as in the interpretation of our ordinary contracts, seek, above all, the meaning which must have been intended by the representatives of the confederated provinces." And Henry, J., also, from whose judgment in Mercer *v.* The Attorney-General for Ontario a passage is cited above, speaks in a manner suggestive of a different view in City of Fredericton *v.* The Queen,[2]

Per Jette, J.

Must consider intention of provincial delegates.

Per Henry, J.

[1] M.L.R. 1 S.C. at p. 41, 4 Cart. at p. 97, (1884), *sub nom.* 'The North British and Mercantile Fire and Life Ins. Co. *v.* Lambe.'

[2] 3 S.C.R. at p. 548, 2 Cart. at p. 44, (1880). See p. 4, *supra.*

saying:—"In order properly to construe the British North America Act, it is necessary and proper to consider the position of the united provinces before the Union. Each had what may be properly called plenary powers of legislation in respect to provincial subjects. In the agreement for the Union provision was made for the general powers of Parliament and the local legislatures, as well as for the 'ways and means' by which each was to be sustained. It was by a surrender of the local legislative power, to the extent agreed upon, that the powers of Parliament were agreed to be given. It was in the nature of a solemn compact, to be inviolably kept, that the rights and prerogatives of both were adopted, and the agreements entered into were intended to be carried out by the Act mentioned. That that compact cannot be changed by one, any more than another of the contracting parties, is a proposition embodied in despatches from the Imperial government, and one which I think cannot be gainsaid. It is, therefore, only permissible to construe the Act in conformity with that consideration."

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And position of provinces before Confederation.

The Act a compact.

In like manner, in Molson *v.* Chapleau,[1] Papineau, J., observes:—"The terms themselves of the preamble of the Act demonstrate that, if there is a union, it is a federal union: 'Whereas the provinces of Canada, Nova Scotia, and New Brunswick, have expressed their desire to be federally united, etc.,' her Majesty and her Parliament have passed the Act of 1867 to carry out this desire. The provinces also have granted to the Dominion a large part of the powers which belonged to them at the moment of union. But they have kept some powers which belong to them, to the exclusion of

And a solemn contract.

[1] 6 L.N. at p. 224, 3 Cart. at p. 367, (1883). Cf. Belanger *v.* Caron, 5 Q.L.R. at p. 21, (1879).

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the Dominion which they have wished to form, and for which they have expressed the desire to contract their union. The Imperial parliament only acts to give effect to the contract, the conditions of which were settled in conferences of the provincial delegates. The Imperial Act is only the solemn contract establishing the articles agreed to by the provinces in the conferences which preceded the confederation. It ought then to be interpreted without losing sight of this historical fact."

Must be interpreted accordingly.

So per Spragge, C.J.

And again in Regina *v.* Frawley[1] Spragge, C.J., referring to No. 15 of section 92, whereby provincial legislatures can make laws in relation to the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the province, etc., and after stating that in order to the enforcing of by-laws of municipal corporations, imprisonment with hard labour was one of the means authorized by the law of Upper Canada before Confederation, says:—"The Act," (*sc.*, the British North America Act), "as has been often said, was the fruit of a compact. Is it reasonable to read the Act as if intended to fetter the provincial legislatures in their discretion as to the kind of imprisonment which they should judge to be reasonable and proper for an infraction of their laws, even to abridge the power in matters of police regulation—matters peculiarly within their province—which they already possessed? . . It is safe to say that the word 'imprisonment' could not have been received in that sense by the parties chiefly interested in the compact,—the provinces."

This mode of reasoning may be permissible, but, if our second leading proposition expresses the correct view of the matter and the British North America Act

[1] 7 O.A.R. at p. 267, 2 Cart. at p. 585, (1882).

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is to be regarded as a new departure, it can scarcely be correct to say, as Peters, J., does in Kelly *v.* Sulivan[1]:—"This Island had a constitution similar to that of the other British North American provinces when it entered the confederacy. . . . The British North America Act of 1867 does not abrogate these provincial constitutions, but merely withdraws from them the power of making laws regarding certain matters, enumerated in the 91st section, over which they previously had jurisdiction. But as to all matters not so withdrawn, the provinces remain in possession of their 'old dominion,' and retain their jurisdiction over them in the same plight as it previously existed;" although section 64 of the British North America Act, which provides that the executive authority of Nova Scotia and New Brunswick shall continue as at the Union until altered under the authority of the Act, may seem to lend some countenance to the theory of the continuance of the ante-Confederation constitutions.[2] The argument in favour of the view thus expressed by Peters, J., will be found elaborated by Mr. Justice Loranger in his "Letters upon the Interpretation of the Federal Constitution," already referred to.[3] At p. 14 he says:—"The constitution of the provinces of Upper and Lower Canada had come to them by the Constitutional Act of 1791, which was not repealed by the Union Act of 1840, but simply modified to make it harmonize with the new system. It is therefore to the Constitutional Act of 1791 that we must look for the origin of the powers of these legislatures which were

View that ante-Confederation constitutions not abrogated.

Per Peters, J.

Has some support in sec. 64 of B.N.A. Act.

Per Loranger, J.

Letters on Federal Constitution.

Acts of 1791 and 1840.

[1] 2 P.E.I., at pp. 91-2, (1875). For documents relating to the early constitution of the maritime provinces, see Can. Sess. Pap. 1883, No. 70. See, also, Clement's Canadian Constitution, p. 25, *seq.*

[2] See the notes to Propositions 26 and 66.

[3] P. 18, *seq.*

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in force at the time of Confederation." Part of these powers, he contends, (p. 62), "they" (*sc.*, the provinces) "ceded to the Federal parliament to exercise them in their common interest and for purposes of general utility, keeping the rest, which they left to be exercised by their legislatures, acting in their provincial sphere, according to their former constitutions, under certain modifications of form, established by the federal compact." But see Proposition 66 and the notes thereto. Moreover, the Union Act of 1840 does (Imp. 3-4 Vict., c. 35, sec. 2) repeal so much of the Act of 1791 "as provides for constituting and composing a legislative council and assembly, and for the making of laws."

Provinces retained their former constitutions, though modified.

Prop. 66.

Mr. Bourinot agrees with Loranger, J.

Mr. Bourinot, however, seems to favour the same view. He follows the passage already quoted from his article on Federal government in Canada,[1] by saying:—"The weight of authority appears to rest with those who have always contended that on entering into the Federal compact, the provinces never intended to renounce their separate and distinct existence as provinces when they became part of Confederation." And he refers with approval to the argument of Mr. Edward Blake in St. Catharines Milling and Lumber Co. *v.* The Queen, from which an extract in point will be found contained in the latter part of the notes to Proposition 64, *infra*.

But we find a useful warning against attaching too much importance in construing the British North America Act to the state of things before Confederation in the words of Crease, J., in the Thrasher Case[2]: — "To us in British Columbia,—*penitus toto orbe divisos*,

Per Crease, J., *contra.*

[1] 9 C.L.T. at p. 220. See *supra* p. 10, n. 1.

[2] 1 B.C. (Irving) at p. 195, (1882).

—it is given to look with an eye that pays no regard to the inter-provincial divisions, rivalries, or distemperatures existing previous to Confederation, and which that great measure was intended to cure. No judgment here will be biassed either way by such considerations. We do not ask or care what negotiations took place before Confederation, but what was the effect,—where the terms of the contract itself are clear,—of the contract of union itself on British Columbia? . . . And that can only be gained by a careful study of the British North America Act itself. It seems strange at this day to be entering into an explanation of such a principle, that negotiations are but the necessary preliminaries to a contract; or that there is no proposition in law more accepted than that the preliminaries to a contract, which in itself is so clear and complete, are at once merged in the written contract itself; but the marked reference of the Attorney-General during the argument to speeches of the great promoters of Confederation make it necessary. The Act itself, and the terms of Confederation which it embodies, form the contract, the effect of which we have stated." And later on in the same judgment, at p. 208, Crease, J., quotes the words of Lord Selborne in Regina *v.* Burah,[1] where, after saying that the Indian legislature has powers expressly limited by the Act of the Imperial parliament which created it, and can do nothing beyond the limits which circumscribe those powers, his lordship adds :—" The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so is by looking to the terms of the instrument by which, affirmatively,

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British Columbia.

Looks solely to B.N.A. Act.

Analogy from law of contract.

Per Lord Selborne in Reg. *v.* Burah.

[1] 3 App. Cas. at p. 904, 3 Cart. at p. 428, (1878).

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the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial parliament at variance with it), it is not for any court of justice to enquire further, or to enlarge constructively those conditions and restrictions." "Lord Selborne," observes Crease, J., "does not say you must enquire into all the previous negotiations which led up to its enactment, or that we must look to a previous compact and give our legal interpretation to the Act by the light of that."

Courts of Justice can regard only terms of Constitution Act.

Cannot enlarge them constructively.

And before concluding this article we may notice that in the Queen *v.* The Mayor, etc., of Fredericton Fisher, J.,[1] endeavours, in view of the history of the Union, and the way it was brought about, to import a sort of special significance to the provision in No. 13 of section 92 of the British North America Act, whereby jurisdiction over property and civil rights in the province is assigned to provincial legislatures. He is there discussing whether the 99th section of the Canada Temperance Act, 1878, trenches upon property and civil rights more than is necessary for the regulation of trade in intoxicating liquors, and says:—"Notwithstanding that all the exclusive powers of the parliament and local legislature are co-equal in their energy and authority, I have ever considered the power to deal with property and civil rights the least liable to assault, and the power of all others to be most sacredly guarded and maintained; property and civil rights

Property and civil rights in the province.

No. 13, sect. 92, B.N.A. Act.

Special significance attributed to it by Fisher, J.

[1] 3 P. & B. at pp. 169-170, (1879).

would appear to cover the whole field of enquiry and legislation in the parliament, and the local legislature,—the great bulwark around which clusters the interests and liberties of every individual within the limits of the Confederacy. Referring to the history of the Union of the confederated provinces and to their peculiar condition previous thereto, we know that while each province evinced a justifiable jealousy on this subject and a determination to reserve to the local legislature the exclusive right to deal with it, one province made it a condition upon which alone it would enter the Union, that its local legislature should exercise this power. To provide for this entire control, the English language was put into requisition to select terms or phrases which should then and in all coming time secure that object by defining the authority in the largest sense. This subject, the dealing with this power, the security it was designed to provide for in the different provinces, was the primary question to be solved before any terms of Union could be agreed upon. Other objects of importance were discussed and disposed of as incidental to the new state of things the Union would call into existence; but an inability to agree upon the question of property and civil rights would have rendered every effort for Union abortive. Upon this branch of the enquiry I should feel it my duty in construing this or any other Act, if I had any doubt as to its interfering," (*sc.*, unnecessarily), "with property and civil rights, to give the benefit of that doubt to that authority, and for the reason I have stated."

Prop. 1-2

The history of the Union

Essential condition of the Union.

There does not, however, appear to be in the British North America Act itself, or in the decisions generally, anything to support the view that the provision in section 92 as to property and civil rights

Sed quære.

Prop. 1-2

has any greater sanctity or stands in any different position than that of any of the other provisions in sections 91 and 92 conferring legislative powers; though at the same time it may be true that, as is intimated in Citizens' Insurance Co. *v.* Parsons[1] and in *Re* Windsor & Annapolis R.W. Co.,[2] the words "property and civil rights" are to be understood in their largest sense. In fact, as stated by Tessier, J., in Bank of Toronto *v.* Lambe[3] :—"The Confederation Act was passed with the object of consolidating (concilier) the interests and rights of the pre-existing provinces; that Act should be liberally interpreted. It is but a federal alliance in which each province has been constituted with a regular government."[4]

The B.N.A. Act should be liberally interpreted.

[1] 7 App. Cas. at p. 111, 1 Cart. at p. 276, (1881).

[2] 4 R. & G. at p. 321, 3 Cart. at p. 398, (1883).

[3] M.L.R. 1 Q.B. at p. 166, (1885), *sub nom.* 'North British and Mercantile, etc., Ins. Co. *v.* Lambe.' And see Proposition 3 and notes thereto.

[4] As to the theory of the continuance of the old provincial, or rather colonial constitution in Canada, see also the notes to Proposition 4, *infra*, esp. at p. 64, *seq.*

PROPOSITION 3.

3. Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes [of a similar character, that is to say, statutes conferring constitutional charters]. The British North America Act cannot be construed in a rigidly technical manner.

The Privy Council.

The opening words of the above Proposition, that is to say, "Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes," are taken from the judgment of the Privy Council in The Bank of Toronto *v.* Lambe[1], and it is well to notice the connection in which the words were used. They come at the very commencement of the judgment, which begins as follows:—"These appeals raise one of the many difficult questions which come up for judicial decision under those provisions of the British North America Act, 1867, which apportion legislative powers between the parliament of the Dominion and the legislatures of the provinces. It is undoubtedly a case of great constitutional importance, as the appellant's counsel have earnestly

[1] 12 App. Cas. at p. 579, 4 Cart. at p. 12, (1887).

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impressed upon their lordships. But questions of this kind have been left for the decision of the ordinary Courts of law, which must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes." Thus it would appear that, in their immediate application, the words used by their lordships had reference to their dictum that the constitutional importance of the questions raised must not affect the construction of the Act.

Constitutional importance of questions raised cannot control the construction of the B.N.A. Act.

In the same way in *Ex parte* Renaud,[1] Ritchie, C.J., delivering the judgment of the majority of the New Brunswick Supreme Court, says:—"We are at a loss to discover anything in the British North America Act indicating a legislative intention of using the words otherwise than in their ordinary meaning." As Crease, J., observes in the Thrasher Case,[2] in interpreting the British North America Act, "The point to be settled is a legal one. We have to regard it from a strictly legal point of view."

It must be regarded from a strictly legal point of view.

Similarly, in reference to the Constitution of the United States, Prof. Dicey writes in his Law of the Constitution[3]: "The task, in short, which lay before the great American commentators was the explanation of a definite legal document in accordance with the received canons of legal interpretation."

So with the United States constitution.

Thus again in *Ex parte* Leveille,[4] Mackay, J., says:—"I hold that the British North America Act must

Per Mackay, J.

[1] 1 Pugs. at p. 286, 2 Cart. at p. 464, (1873).

[2] 1 B.C. (Irving) at p. 196, (1882).

[3] 3rd ed., at p. 5.

[4] 2 Steph. Dig. at p. 446, 2 Cart. at pp. 349-50, (1877).

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be interpreted as any other statute. The whole of it must be considered, and, if possible, force must be given to each clause of it. Though the 91st section reads as it does, the next one has been enacted. Why? Surely not to conflict with the preceding one; but presumably to work with it. I think it a qualification of it; as the last statute in point of time controls, so later clauses are held to qualify earlier ones; the last clause is the last expression of the law maker. Cannot section 92 be worked without violence against section 91? I think that it can. Section 91 being enacted, 92 expresses a particular intention in the nature of an exception to it.[1] It is said to be repugnant; no more so than would have been a proviso to the same effect. Section 91 gives the Dominion the regulation of commerce in the wide sense, but section 92 allows Quebec province to make certain regulations affecting purely internal commerce."[2]

The B.N.A. Act must be construed as a whole, on the same principles as other statutes.

Sect. 92 in nature of an exception to Sect. 91.

The regulation of trade and commerce.

In like manner, in Reg. *v.* Taylor,[3] Draper, C.J., says:—"We must consider what is the effect of the apparent interference or inconsistency between sections 91 and 92. Mr. Dwarris (on Statutes, 2nd ed., at p. 513) states as a rule that the general words in one clause of a statute may be restrained by the particular words in a subsequent clause of the same statute, referring to Magna Charta, Inst., pp. 20, 30, the 9th branch or clause of which confirms to the Barons of the Cinque Ports 'all their liberties and free customs,' but these words are restrained by branch or clause 17, which took from

So, also, per Draper, C.J.

[1] See Proposition 40 and the notes thereto.

[2] As to this matter of the regulation of trade and commerce, see the notes to Proposition 49.

[3] 36 U.C.R. at p. 223, (1875).

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them the right to hold pleas of the Crown. I may here properly apply the language of Best, C.J., in Churchill *v.* Crease, 5 Bing. at p. 180, and say I should have thought the language of section 91, the regulation of trade and commerce, conclusive if there had been no conflicting intention to be collected from the Act; but the rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. This appears to me to settle any question as to inconsistency between the two sections."

General intention and particular intention.

An example per Strong, J.

And for an example of the ordinary rules of statutory interpretation being applied to the construction of the British North America Act in a matter of wide importance, we may refer to the judgment of Strong, J., in Queen *v.* Robertson,[1] where the Supreme Court had occasion to interpret No. 12 of section 91, whereby power to legislate in relation to sea coast and inland fisheries is bestowed upon the Dominion parliament. He observes that:—"It is a sound and well-recognized maxim of construction that in the interpretation of statutes we are to assume nothing calculated to impair private rights of ownership, unless compelled to do so by express words or necessary implication . . . I think there is room for applying an analogous principle in the present case. Although the provision in question does not in itself make any disposition of the fisheries mentioned, but is merely facultative, empowering Parliament to make laws respecting the subjects mentioned, we are not to assume, without express words or unavoidable implication, that it

Sea coast and inland fisheries.

Must not assume intention to interfere with private rights.

[1] 6 S.C.R. at p. 134, 2 Cart. at p. 107, (1882).

was the intention of the Imperial legislature to confer upon Parliament the power to encroach upon private and local rights of property which by other sections of the Act have been especially confided to the protection and disposition of another legislature."[1]

Another example, per Dorion, C.J.

And for another example we may turn to the words of Dorion, C.J., in Bank of Toronto *v.* Lambe[2] :—"It has been contended that, as by sub-section 16 of section 92 the local legislatures were authorized to legislate on all matters of a purely local or private nature in the provinces, they were therefore authorized to raise a revenue for provincial purposes by all modes of taxation, including direct and indirect, as well as by customs and excise duties. The answer to this contention is obvious. One of the most elementary rules of interpretation of statutes is that general provisions in an Act of parliament do not control nor affect the special enactments which it contains, and therefore the general authority conferred by sub-section 16, as to matters of a purely local or private nature in the province, can only apply to such matters as are not specially provided for by the Act, and as the subject of provincial taxation is specially provided for by sub-sections 2 and 9 of section 92, sub-section 16 does not apply to the subject of taxation. If sub-section 16 was not limited by the preceding sub-sections 2 and 9, these sub-sections would have been quite unnecessary, since sub-section 16, by the generality of its terms, would have covered all

Provincial powers of taxation.

Matters of local and private nature in the province

No. 16 of sect. 92, B.N.A. Act.

[1] See Proposition 53.

[2] M.L.R. 1 Q.B. at p. 136, 4 Cart. at p. 34-5, (1885), *sub nom.* 'North British and Mercantile, etc., Ins. Co. *v.* Lambe.'

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subjects over which the provincial legislatures could have exercised their legislative authority."[1]

"And other licenses," No. 9 of sect. 92.

Per Taschereau, J.

In Angers *v.* The Queen Insurance Co.,[2] Taschereau, J., after observing that if the words "other licenses" in No. 9 of section 92 was to be construed as comprising licenses to insurance companies, then banks, railroad companies, and express companies are also comprised in these words, and in effect the power to tax indirectly is unlimited, goes on to cite extracts from the debates on Confederation in the Canadian parliament in order to support his opinion that the constitution did not intend this, and follows them up by the remark :—" No doubt, the Imperial statute must, as any other statute, be construed by itself, and the opinions I have referred to are not legal authorities. But can we not look at them in order to interpret this statute? And it is to be borne in mind, in referring to the history of our constitution, that those persons whose opinions I have cited formed part of the preliminary conference when the resolutions on Confederation were framed. Can it be said

The debates on Confederation may be used as a guide.

[1] Though it does not affect the matter in relation to which the above extract is cited, it may be observed that a little later on in the same judgment (M.L.R. 1 Q.B. at p. 145, 4 Cart. at p. 42) the learned judge says:—" It will be said that in the case of Dow *v.* Black, L.R. 6 P.C. 272, 1 Cart. 95, the Privy Council stated that there might be other taxes imposed under sub-section 16 besides those mentioned in sub-sections 2 and 9, but this was entirely outside of the case, since their lordships were of opinion that the tax claimed was a direct tax, and they did not indicate what other taxes could be imposed under section 16, and therefore it cannot be said to what they allude by the observation they made. I am, however, free to admit that there may possibly be some taxes which might be imposed for a local purpose under sub-section 16." See on this subject the notes to Proposition 66, *infra*.

[2] 16 C.L.J. N.S. at p. 203, 1 Cart. at pp. 146-7, (1877).

that a commentary on a law by the author of that law should have no weight?" [1] Prop. 3

[1] As to the meaning of the words "other licenses" in No. 9 of section 92, it would appear from Russell *v.* The Queen, 7 App. Cas. at p. 838, 2 Cart. at p. 21, (1882), that the Privy Council certainly did not deem them to refer only to licenses *ejusdem generis*, for they speak there *obiter* of "licenses granted under the authority of sub-section 9 by the provincial legislature for the sale or carrying of arms." In Hamilton Powder Co. *v.* Lambe, M.L.R. 1 Q.B. at p. 463, (1885), Cross, J., expresses the view that he was bound by the decision of the Supreme Court of Canada in Severn *v.* The Queen, 2 S.C.R. 70, 1 Cart. 414, (1878), to hold that "other licenses" must be restricted to those *ejusdem generis*, and cites Doutre on the Constitution of Canada, p. 230, as showing that the Privy Council have spoken in the same way as to that sub-section. But there is a most curious mistake here, for the case referred to by Doutre, namely, Brown *v.* The Curate, etc., of Montreal, L.R. 6 P.C. 157, was not a case under the British North America Act, and had nothing to do with No. 9 of section 92, but was a case where the Privy Council rigidly applied the rule *ejusdem generis* to a law of the Quebec legislature. And in this case of Hamilton Powder Co. *v.* Lambe, at p. 467, Ramsay, J., would seem to hold that at all events the license there in question, namely, for the storing of gunpowder, was authorized by No. 9 of section 92. But that in Severn *v.* The Queen, 2 S.C.R. 70, 1 Cart. 414, a majority of the judges decided that the rule of *ejusdem generis* applied to No. 9 there is no doubt: per Gwynne, J., in Molson *v.* Lambe, 15 S.C.R. at p. 288, 4 Cart. at p. 348, who adds that Severn *v.* The Queen is not shaken by Russell *v.* The Queen, 7 App. Cas. 829, 2 Cart. 12, but "is still a judgment binding upon this Court and all Courts in this Dominion." In Severn *v.* The Queen, Ritchie, C.J., says that the rule of *ejusdem generis* could not apply to "other licenses," for, in fact, the licenses specified were not *ejusdem generis*, nor could the maxim *noscitur e sociis* be applied (2 S.C.R. at pp. 100-1, 1 Cart. at p. 443), and Strong, J., expresses the same view (2 S.C.R. at pp. 106-7, 1 Cart. at p. 450). On the other hand, Richards, C.J., thinks they should be restricted to licenses *ejusdem generis* (2 S.C.R. at p. 91, *seq.*, 1 Cart. at p. 435, *seq.*); and so do Fournier, J. (2 S.C.R. at p. 118, 1 Cart. at p. 462), and Henry, J. (2 S.C.R. at p. 140, 1 Cart. at p. 485), and apparently Taschereau, J. (2 S.C.R. at p. 114, 1 Cart. at p. 458). And in the case decided some two years before Severn *v.* The Queen, of Regina *v.* Taylor, 36 U.C.R. at p. 198, Wilson, J., had held in the same way, namely, that the effect of the words "other licenses" must be determined by the rule *noscitur e sociis*, adding:—"They seem to have a particular connection with, and affinity to, those licenses which are commonly mentioned and found along with shop, saloon, tavern, and auctioneer licenses, and which are chiefly contained in the municipal Act, such as licenses on billiard tables, victualling houses, ordinaries, houses where fruit, etc., are sold, hawkers and peddlers, transient traders, livery stables, cabs, intelligence offices, and perhaps other licenses in the regulation of markets and in some other cases." And he held, therefore, that the Ontario legislature had no right to impose a license on brewers and distillers, for "the business of these persons is not specified plainly in the statute giving the Ontario legislature the power over them; and it is an established rule that a statute which imposes a tax must be strictly con-

Meaning of "other licenses" in No. 9 of sect. 92.

The Privy Council.

Licenses to store gunpowder.

Severn *v.* The Queen.

Reg. *v.* Taylor.

Brewers' licenses.

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The B.N.A. Act must be construed as other statutes of a similar character.

And although the British North America Act must be construed by the same methods of construction and exposition as other statutes, it would seem necessary to explain that what is meant

strued, *a fortiori* must a claim of right to impose a tax be strictly construed, whether it be by the Crown or by any subordinate power or person whatsoever. And the business of a brewer has always been dealt with as a matter of excise, and of direct government control, and is so still." But on appeal to the full Court, Draper, C.J., with whom Strong, Burton, and Patterson, JJ., express a general concurrence (see at p. 222), thought the argument founded on the application of the rule was answered "by the consideration of the object, 'raising a revenue for provincial as well as for local and municipal purposes.'" He adds:—"I think we should not look out of the Imperial Act for the *socii*, whose character is to affix a meaning to 'other licenses'; and granting that the four named occupations have got into low company in the Ontario Municipal Act, they are lifted out of it in section 92." But the decision of the case did not turn on this point, and the Court affirmed Wilson, J., in holding that the Ontario legislature could not impose a license and payment of duty therefor upon wholesale sellers of spirituous liquors. Wilson, J., in this case of Regina *v.* Taylor, 36 U.C.R. at p. 199, seems to advance a somewhat curious view, that because the business of a brewer is, and has always been, carried on under strict government rules and regulations, it could not under any circumstances be included within such general words as "other licenses." For, he says:—"It cannot be said that a business of that nature is one which is covered by, or included within, the general words 'and other licenses,' especially when these words are in association with licenses of a very inferior and different class, and which relate only to sales by retail, while the brewers' license relates to sales by wholesale." Turning to New Brunswick, we find that in *Ex parte* Fairbairn, 2 P. & B. (18 N.B.) 4, (1877), the provincial Act, 38 Vict., c. 88, imposing the taking out of a license, to be granted by the Mayor of Fredericton, on any person, not being a ratepayer, engaging "in any trade, profession, occupation, or calling in the said city," was held *intra vires*, under No. 9 of section 92 of the British North America Act; and this was approved and followed in Jonas *v.* Marshall, 4 P. & B. (20 N.B.) 61, (1880), where a similar Act as to St. John, 33 Vict., c. 4, was also held *intra vires* in the same way, Palmer, J., saying (at p. 63):—"I think the 9th sub-section of section 92 gives exclusive powers to the local legislature to legislate in relation to licenses of any kind that they may think desirable for the purpose of raising a revenue for provincial, local, or municipal purposes, and for no other purpose." When this case came before the Supreme Court of Canada, *sub nom.*, Jonas *v.* Gilbert, 5 S.C.R. 356, (1881), it went off on another point, and the constitutional question was not entered upon: see Thomas *v.* Haliburton, *et al.*, 26 N.S. at p. 74. And before leaving the subject we may observe that in the case of Hamilton Powder Co. *v.* Lambe, M.L.R. 1 Q.B. at p. 463, and also in City of Montreal *v.* Walker, M.L.R. 1 Q.B. at page 472, the view is taken that even if the local legislatures may not impose a license for revenue purposes in cases outside No. 9 of section 92, they may nevertheless enforce police regulations by way of requiring licenses, fixing a moderate and liberal license fee, and not a revenue fee. See further, *infra*, at pp. 47-9, 54-63, and Appendix A.

Per Draper, C.J.

Per Wilson, J.

License duty on all trades and callings.

Police regulation.

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is other statutes of a similar character, although it may be impossible to acquiesce without reserve in the words of Henry, J., in City of Fredericton *v.* The Queen,[1] that we should construe the British North America Act in the way pointed out by Vattel (Book II., chapter 17, sections 285, 286), namely, remembering that "a constitution of government does not and cannot from its nature depend in any great degree upon mere verbal criticism or upon the import of single words," and that "while we may well resort to the meaning of single words to assist our enquiries, we should never forget that it is an instrument of government we are to construe; and, as has been already stated, that must be the truest exposition which best harmonizes with its design, its objects, and its general structure." They are repeated, however, by Spragge, C.J., in Hodge *v.* The Queen,[2] and again by the same learned judge in Reg. *v.* Frawley.[3]

Vattel referred to.

The Act an instrument of government.

And in the argument before the Judicial Committee of the Privy Council in Hodge *v.* The Queen we find the view of the Act expressed in the passages just cited remarked upon, and Mr. Jeune, of counsel for the appellant, referring especially to the words of Spragge, C.J., in Reg. *v.* Frawley, observes :— "He says this is a charter of government, and

Argument before the Privy Council in Hodge *v.* The Queen.

[1] 3 S.C.R. at pp. 550-5, 2 Cart. at pp. 46-49, (1880).

[2] 7 O.A.R. at p. 253, 3 Cart. at p. 168, (1882).

[3] 7 O.A.R. at p. 265, 2 Cart. at pp. 582-3. In Angers *v.* The Queen Insurance Co., 22 L.C.J. at p. 311, 1 Cart. at p. 152, (1878), we find Dorion, C.J., saying:—"This Act" (*sc.*, the British North America Act) "seems to escape from the ordinary rules of construction applicable to statutes generally. The Confederation Act must be interpreted according to the real or presumed intention of the Imperial parliament, of the legislatures of the several provinces, and this intention must be gathered from the circumstances existing in the several provinces at the time of Confederation." As to which, see Proposition 4 and the notes thereto.

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therefore to be construed in a larger way. No authority is given for that. One Act of Parliament must be construed like another";[1] while later on in the same argument Mr. Davey, of counsel for the respondent, citing the words attributed to Vattel in the judgments above cited (but which are really, it would appear, taken from Story on the Constitution, section 455),[2] and alluding especially to the point raised in that case, that "imprisonment" under No. 15 of section 92 did not include "imprisonment with hard labour," says[3]:—"I agree that is a little vague, but still I think it is a sound principle that you are not to criticize the language of a constitutional charter, or of an Act of parliament of this kind, like a criminal indictment, and I should say that it is a perfectly sound distinction to say that although a criminal Act, imposing imprisonment as a punishment for a definite offence, would not authorize the judge to give hard labour, but simple imprisonment, unless so expressed, it does not follow from that that in a constitutional charter, or, if my learned friends object to that expression, an Act of parliament, conferring legislative power on a provincial legislature, you are to construe the word 'imprisonment' with the same strictness." And the Judicial Committee did hold in this case of Hodge *v.* The Queen[4] that "the imposition of punishment by fine, penalty, or imprisonment," in No. 15 of

Vattel.

A constitutional charter.

Provincial power to impose hard labour.

[1] Dom. Sess. Papers, 1884., Vol. 17, No. 30, p. 88.

[2] See 3 Cart. at p. 169, note.

[3] Dom. Sess. Pap., *ib.*, p. 123.

[4] 9 App. Cas. at p. 133, 3 Cart. at p. 164, (1883). It had been held otherwise in the Superior Court Quebec, in Poitras *v.* Corporation of Quebec, 9 R.L. 531, (1879). And see Hodge *v.* The Queen commented on by "R." in 7 L.N. at p. 49, and by Dr. Francis Wharton, *ib.*, at pp. 169, 177.

section 92, includes "imprisonment with hard labour," not, however, elaborating the point, but merely saying:—"Under these very general terms, 'the imposition of punishment by imprisonment for enforcing any law,' it seems to their lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it, 'hard labour'; in other words, that 'imprisonment' there means restraint by confinement in a prison, with or without its usual accompaniment, hard labour." The Court of Appeal for Ontario had previously decided the same point in the same way in Regina *v.* Frawley,[1] where, in the passage referred to by Mr. Jeune, Spragge, C.J., with whom Burton, J.A., concurs, says[2]:—"It may be conceded that an Act creating an offence and annexing imprisonment simply, as the penal consequence of committing the offence, would not warrant sentence of imprisonment with hard labour; but the question is a very different one when we find the word in an Imperial charter conferring a constitution." He then cites the passage attributed to Vattel quoted above, and proceeds:—"It must be conceded that the power thus expressly conferred is to be limited to punishment by fine, penalty, or imprisonment. Still, in interpreting the words used, the rule as to construing the Act with strictness, or even with reasonable strictness, does not apply. It does not, in my judgment, apply, because it is used in conferring power upon a legislature, not in simply annexing to a crime its penal consequences; in which latter case the rule of strictness has always been the rule of construction; while in

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No. 15, sect. 92, B.N.A. Act.

Reg. *v.* Frawley

Per Spragge, C.

The Act an instrument of government.

[1] 7 O.A.R. 246, 2 Cart. 576, (1882).

[2] 7 O.A.R. at p. 265, 2 Cart. at p. 582.

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the case of what Vattel calls an instrument of government, which the Confederation Act certainly is, no such rule prevails." And later on he cites from the judgment of Marshall, C.J., in M'Culloch *v.* State of Maryland[1] the words:—"We must never forget that it is a Constitution we are expounding."

Reference to Marshall, C.J.

But it is, of course, obvious that, though the British North America Act confers a constitution upon Canada, still it is a legislative enactment, whereas the constitution of the United States had a different origin, and so it is not necessary to contend that we can apply to the construction of the British North America Act what Professor Dicey says of the constitution of the United States, where he observes[2]:—"A lawyer lecturing on the constitution of the United States would necessarily start from the constitution itself. But he would soon see that the Articles of the Constitution required a knowledge of the Articles of Confederation, that the opinions of Washington, of Hamilton, and generally of the 'Fathers,' as one sometimes hears them called in America, threw light on the meaning of various constitutional Articles; and, further, that the meaning of the constitution could not be adequately understood by any one who did not take into account the situation of the colonies before the separation from England and the rules of common law, as well as the general conception of law and justice inherited by English colonists from their English forefathers."

But the United States Constitution is not a statute.

Prof. Dicey on the methods used in its interpretation.

All that need be contended for is that the British North America Act must have applied to it the same methods of construction and exposition which

[1] 4 Wheat. 316, at p. 407.

[2] Law of the Constitution, 3rd ed., at p. 15.

apply to other statutes of a like nature, and there is in this nothing at variance with the dictum of the Privy Council in the Bank of Toronto *v.* Lambe from which is derived the first part of the leading Proposition under discussion. And in this way, perhaps, may be reconciled the seemingly adverse dictum of Burton, J.A., in Regina *v.* St. Catharines Milling and Lumber Co.,[1] where he says that the British North America Act "is not to be construed like an ordinary Act of Parliament, but as pointed out in Hodge *v.* The Queen, 9 App. Cas. 117, 3 Cart. 144, is to be interpreted in a broad, liberal, and quasi-political sense."

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The B.N.A. Act belongs to a very special class of statutes.

Per Burton, J.A.

It is somewhat of a puzzle to make out what it is in Hodge *v.* The Queen to which the learned judge is here referring. Certainly nowhere in the judgment of the Privy Council in that case is it stated in so many words that the British North America Act is not to be construed like an ordinary Act of Parliament, but in a broad, liberal, and quasi-political sense. Something of the sort, however, seems to have been said in the argument of counsel for the Crown as reported in 9 App. Cas. at p. 121, 3 Cart. at p. 149, referring to the oft-cited passage from Vattel, but their lordships expressly disavow the intention of laying down in their judgment "any general rule or rules for the construction of the British North America Act." But what the learned judge is referring to would seem to be rather the broad and liberal way in which their lordships interpreted the powers conferred upon the provincial legislatures, holding that to contend that these legislatures have no power to delegate their functions "is founded on an entire misconception of the

Must receive a broad, liberal, and quasi-political interpretation.

Hodge *v.* The Queen.

The Privy Council.

[1] 13 O.A.R. at p. 165, 4 Cart. at p. 207, (1886). See also pp. 29-32, *supra*.

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true character and position of the provincial legislatures," and declaring that these bodies "are in no sense delegates of or acting under any mandate from the Imperial parliament"; but that they have authority as plenary and as ample within the limits prescribed by section 92 as the Imperial parliament in the plenitude of its powers possessed and could bestow. As to which see Proposition 17 and the notes thereto.

Per James, J.

And the words of James, J., in Windsor and Annapolis R.W. Co. *v.* Western Counties R.W. Co.[1] may well be referred to in this connection:—

The B.N.A. Act must be construed with extreme liberality.

"The British North America Act ought, I think, to be construed with extreme liberality. Its scope and effect are to transform three great provinces, each with a separate and independent legislature possessing almost national powers, into one great Dominion with a central legislature. . . It is rather in the nature of a treaty between nations, such as that recently accomplished at Berlin, than an ordinary Act of parliament. Its provisions are expressed with extreme brevity, and in the most general and comprehensive terms; and if the principles of construction applied to ordinary Acts of parliament are applied to it, instead of giving it the very liberal construction which its nature and circumstances demand, in my opinion, the most mischievous consequences must necessarily result."

Per Cross, J.

In Attorney-General of Quebec *v.* Reed,[2] however, Cross, J., says:—"It is not possible in all cases to reconcile the powers which by sections 91 and 92 are attributed respectively to the Dominion and provincial legislatures, nor is it easy, apart from the

[1] 3 R. & C. at p. 407, (1878).

[2] 3 Cart. at pp. 223-4, (1883).

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question of conflict, to determine the extent of the particular powers. Before invoking considerations of a more extended character, embracing notions of a general policy, presumed intention or otherwise, I think it is the duty of the judge to whom a like question to the present is submitted to inquire how far a solution of the difficulty can be reached within the terms of the statute itself, applying to this task his appreciation of the context of the different provisions that may bear upon it, not omitting the desirability of adopting, when practicable, such a construction as will facilitate and give effect to the operation of the law, so as to secure as much as possible the attainment of its objects."

But the terms of the statute must govern.

Per Richards, C.J.

Again in Reg. *v.* Boardman,[1] Richards, C.J., in delivering the judgment of the Ontario Court of Queen's Bench, remarks upon the difficulty of construing the British North America Act in a rigidly technical manner, as illustrated by the difficulty that arises in construing No. 27 of section 91, which assigns to the Dominion parliament "the criminal law, including the procedure in criminal matters," in connection with No. 15 of section 92, which assigns to the provincial legislatures "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province, made in relation to any matter coming within any of the classes of subjects enumerated in this section," if we are to give a rigidly technical construction to the word "criminal." He comes to the conclusion that we are not to do so, but rather to consider that the word "criminal" in the British North America Act may have been used in view of the popular idea of criminal law, in which such acts as keeping open

Cannot construe the Act in a rigidly technical way.

"Criminal law" in No. 27, sect. 91, as distinguished from provincial penal statutes.

Refers to crimes in the popular sense.

[1] 30 U.C.R. at p. 557, 1 Cart. at p. 681, (1871).

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public houses after certain hours and a variety of breaches of police regulations which will readily occur to the mind of any one are looked upon as in no sense crimes, though they may be punishable by simple conviction or by way of indictment.

Crimes at common law

A delicate distinction in this matter is taken in Reg. *v.* Lawrence,[1] namely, that though under No. 15 of section 92 a local legislature may pass Acts which in a strict and technical sense ought to be called "criminal laws," to enforce obedience to provincial laws, yet it cannot under pretence of doing this legislate in regard to offences which are criminal offences at common law (such as tampering with witnesses and subornation of perjury) and wholly collateral to the prosecution for the violation of such provincial laws.[2]

Or to what is *malum in se.*

It may also be noted that the dicta of some judges seem to point to the conclusion that to come within the meaning of "criminal law" in No. 27 of section 91, and so to fall under the exclusive jurisdiction of the Dominion parliament, an offence must be of that kind which is esteemed to be *malum in se*, quite apart from its being also *malum prohibitum*. Thus, the words of Allen, C.J., in The Queen *v.* City of Fredericton,[3] appear to support this view :—"I admit that some of the provisions of the Canada Temperance Act are quasi-criminal; but the fact that provisions of a criminal nature would form part of any Act of the

[1] 43 U.C.R. 164, 1 Cart. 742, (1878). See Reg. *v.* Holland, 30 C.L.J. 428, 14 C.L.T. 294; not reported elsewhere.

[2] The judgment, which is that of the Ontario Court of Queen's Bench, affirms the proposition that acts which are criminal offences at common law are not within the power of provincial legislatures, as to which reference may be made to Clement's Canadian Constitution, at pp. 409-10, who thinks that this should not be so held of all criminal offences at common law indiscriminately. See, also, *infra* p. 40, n. 1.

[3] 3 P. & B. at pp. 188-9, (1879). And see per Richards, C.J., in Reg. *v.* Boardman, *supra* pp. 35-6.

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local legislature passed to regulate the sale of liquor by license under the 9th sub-section of section 92 of the British North America Act would not render such Act invalid as dealing with the criminal law, because by the 15th sub-section authority is given to make provision to enforce any law within the powers of the local legislature by fine, penalty, or imprisonment. The sale of spirituous liquors is not *malum in se ;* it only becomes criminal when it is sold in violation of some statute; and an Act of the local legislature regulating the sale, if within its powers, as several of the recent Acts of Assembly on the subject undoubtedly were, might be enforced by punishments similar to those prescribed by section 100 of the Canada Temperance Act." And that a thing must be *malum in se* to come within the meaning of "criminal" in No. 27 of section 91 appears to have been argued in Reg. *v.* Harper,[1] though left undecided, and in Reg. *v.* Wason,[2] Street, J., asks, of the provincial Act there in question :—"Is it an Act constituting a new crime for the purpose of punishing that crime in the interest of public morality? . . If it is . . I think it is bad as dealing with criminal law."[3] But as Dugas, J., points out in Reg. *v.* Harper, just referred to, it is not necessary to revert to No. 27 of section 91 to find the right of the central power to pass laws creating offences and imposing punishments in the interests of peace, order, and good government in the Dominion. Russell *v.* The Queen[4] seems to support this view.

So per Allen, C.J.

And per Street, J.

Offences against public morality.

[1] R.J.Q. 1 S.C. at p. 329, (1892).

[2] 17 O.R. at p. 64, 4 Cart. at p. 616, (1889).

[3] See further, as to the meaning of "criminal law" in No. 27 of section 91, *infra* pp. 40, n. 1, 49-51.

[4] 7 App. Cas. 829, 2 Cart. 12, (1882). But see per Wetmore, J., at p. 50, *infra.*

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Must not construe the B.N.A. Act rigorously.

Although, then, the British North America Act must be construed by the same methods as are applied to other statutes, this must be understood as meaning other statutes of the same character. And so in Paige *v.* Griffith,[1] Sanborn, J., says:—"The British North America Act, conferring legislative powers, is not to be construed rigorously, like a penal Act conferring judicial powers." And he dissents therefore from the view of Drummond, J., and Torrance, J., in *Ex parte* Papin,[2] that under No. 15 of section 92, giving the provincial legislatures power to pass Acts for enforcing the laws of the province "by the imposition of punishment by fine, penalty, or imprisonment," they could not authorize punishment by both fine and imprisonment, for, he says:—"Prior to the British North America Act there can be no doubt that each province had the power to enforce laws which now relate to subjects under the exclusive jurisdiction of the provincial legislature by fine, penalty, and imprisonment," and "it is a generally accepted doctrine that where the Imperial government has granted powers to a colony, it never withdraws them," citing Phillips *v.* Eyre,[3] and quoting from Kent's Commentaries,[4] the rule that, "For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered: What was the common law before the Act? What was the mischief against which the common law did not provide? What remedy the Parliament had provided to cure the

No. 15 of sect. 92.

Provincial penal powers.

Colonial powers once granted never withdrawn.

Kent's rules applied to the B.N.A. Act.

[1] 18 L.C.J. at p. 122, 2 Cart. at pp. 326-7, (1873).

[2] 15 L.C.J. at p. 334, 16 L.C.J. at p. 319, 2 Cart. at pp. 320-2, (1871-2).

[3] L.R. 4 Q.B. 225, 6 Q.B. 1. This might be qualified by adding, "except on request of the colony," remembering the case of Jamaica in 1860, Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 103; Froude's West Indies, pp. 201-2.

[4] The passage will be found in the Blacks. ed., Vol. I., pp. 464-5.

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defect? The true reason of the remedy." And he goes on to say:—"Applying these rules in their spirit, we must consider what legislative powers existed in the several provinces of the Dominion prior to the passing of the British North America Act, and was it the intention to abridge these powers or simply to make a new distribution of them; I think plainly the latter."[1]

Per Boyd, C., in pardoning power case.

And in what is sometimes called the pardoning power case, Attorney-General of Canada *v.* Attorney-General of Ontario,[2] Boyd, C., speaks of "the liberal construction to be given to this (*sc.*, the British North America Act) as a broad constitutional statute conferring and distributing high and large powers of government, both as to Canada and the provinces. It is to be read in the light of history, and with a view to adjust its parts to the life and growth of free political communities. The Act is framed both as to the central and local governments, so as to confer a constitution similar in principle to that of the United Kingdom." And accordingly he held in that case that the Ontario Act, 51 Vict., chapter 5, which purported to vest in the Lieutenant-Governor for the time being, amongst other powers, the power of commuting and remitting sentences for offences against the law of the province, or offences over which the legislative authority of the province extends, was *intra vires*.[3] He rejected the argument that nothing in section 92 of the British North America Act contemplates legislation in reference to the pardoning power in any case, however restricted, as a contention raised on

The Act must be read in the light of history.

And liberally construed, bearing in mind its object.

[1] See, however, Proposition 4, and the notes thereto.

[2] 20 O.R. at p. 254, (1890).

[3] This decision has been since affirmed by the Ontario Court of Appeal, 19 A.R. 31, and by the Supreme Court of Canada, not yet reported.

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the letter of the law and not in accordance with the liberal construction which for the reasons just mentioned he deemed should be given to such an Act, and he held that there was no difficulty in classifying the provincial Act in question as one made in relation to punishment, thus, in the result, throwing the responsibility of advising the exercise of the pardoning power in the case of offences against provincial Acts upon the provincial Ministers, in accordance with that principle of responsibility which is the essence of British parliamentary government and which characterizes the British North America Act. "In brief," he says (20 O.R. at p. 255), "the executive is made accountable to the electorate. Power and responsibility go hand in hand."[1]

No. 15 of sect. 92 of B.N.A. Act.

[1]Since the above was in the press the report of the Nova Scotia case, Thomas *v.* Haliburton *et al.*, 26 N.S. 55, (1893), has appeared. There the validity of a provincial Act came in question, which provided in general terms that the House of Assembly should have the privileges, immunities, and powers of the House of Commons of Canada, and by one of its sections purported to deal with libels, forgery, tampering with witnesses, and other offences, and also constituted the House of Assembly a court, and appointed its members judges, for adjudicating upon such crimes, and provided for the imprisonment of an offender. Graham, E.J., with whom McDonald, C.J., concurred, cites the case of Reg. *v.* Lawrence, referred to on p. 36, *supra*, and says:—"While the provincial legislature may legislate in respect to its privileges, I think it cannot seize the right to adjudicate upon a crime indictable at common law, merely because that offence touches its privileges." Weatherbe, J., however, at pp. 66-67 says:—"I supposed this short answer would be sufficient to meet such an objection, namely, that the province having the undoubted power to prevent obstructions to the business of legislation could prevent obstructions or interference as such, whether that interference was so violent as to amount to criminal conduct, or whether it was conduct less violent. Such legislation by the province, I think, is not an interference with Dominion legislative power dealing with and defining crime. It is not denied that the Dominion parliament could make all insults criminal, and all manner of acts which might constitute obstruction to the provincial legislature crimes," and he held the Act to be *intra vires*. It would seem to be only upon the principle expressed in Proposition 37, as applied to provincial legislatures, that such legislation as was in question in Reg. *v.* Lawrence can be upheld, if at all.

Thomas *v.* Haliburton.

Crimes at common law.

No. 27 of sect. 91, B.N.A. Act.

PROPOSITION 4.

4. The state of legislation and other circumstances in the various provinces of the Dominion of Canada prior to Confederation may sometimes have to be considered in determining the construction of the clauses of the British North America Act respecting the distribution of legislative powers, as may also the character of legislation in England itself.[1]

Undecided position of the matter.

In view of the authorities as they at present exist, it appears impossible to formulate anything more definite than the above Proposition upon the subject referred to.

Must interpret in view of ante-Confederation law.

In Crombie *v.* Jackson,[2] Wilson, J., observes that the British North America Act "must be presumed to have been passed, as Acts of parliament always are presumed to be passed, with a knowledge by the legislature of the then existing law, and the decisions of the Courts upon the matter, which is the subject of legislation," drawing the conclusion that an Act of the Dominion parliament prescribing a certain order of procedure in respect to claims by and against assignees in insolvency could not be beyond the powers of the parliament under section 91, No. 21, "because at the passing of the British North America Act there was a system of proceeding

[1] This page has been reprinted before publication to point out that the Privy Council, as noted *infra* p. 398, n. 1, have now largely destroyed the value of the judgments cited on pp. 43-9, 54-61, as to No. 8 of section 92 of the Act, 'municipal institutions in the province.'

[2] 34 U.C.R. at p. 580, 1 Carl. at p. 687, (1874).

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in insolvency in force in the two former provinces of Upper and Lower Canada very similar to the one established by the Act in question." And in St. Catharines Milling and Lumber Co. *v.* The Queen,[1] Strong, J., says :—"In construing this enactment," (*sc.*, the British North America Act), "we are not only entitled, but bound to apply that well-established rule, which requires us, in placing a meaning upon descriptive terms and definitions contained in statutes, to have recourse to external aids derived from the surrounding circumstances and the history of the subject-matter dealt with, and to consider the enactment by the light derived from such source, and so to put ourselves as far as possible in the position of the legislature whose language we have to expound. If this rule were rejected and the language of the statute were considered without such assistance from extrinsic facts, it is manifest that the task of interpretation would degenerate into mere speculation and guesswork."

So per Strong, J.

Must regard surrounding circumstances and the history of the B.N.A. Act.

Complexity of the question.

The matter, however, is one of great complexity and difficulty. On the one hand, it seems difficult to dispute the accuracy of the words of Mr. Justice Gwynne in the City of Fredericton *v.* The Queen,[2] where he speaks of the provinces as "wholly new creations brought into existence solely by the British North America Act," and adds :—"The executive and legislative authority of all the provinces as at present constituted, as well as of the Dominion, are due to the British North America Act, which now constitutes the sole constitutional charter of each and every of them, and which with sufficient accuracy and precision, as it seems to me, defines the jurisdiction of each," or the similar

In view of what is stated in Propositions 1 and 2.

[1] 13 S.C.R. at p. 606, 4 Cart. at p. 135, (1887).

[2] 3 S.C.R. at p. 563, 2 Cart. at p. 55, (1880).

words of Hagarty, C.J., in Leprohon *v.* The City of Ottawa[1] :—"We must take the Confederation Act as a wholly new point of departure. The paramount authority of the Imperial parliament created all the now existing legislatures, defining and limiting the jurisdiction of each. The Dominion government and the provincial government alike spring from the one source";[2] while it is also necessary to bear in mind, as pointed out by Spragge, C.J., in Hodge *v.* The Queen,[3] that the effect of the British North America Act was in some cases more and other than a distribution of legislative power, it was an extinction of legislative power in regard to some subjects which, up to Confederation, had been subjects of provincial legislation.[4]

Confederation Act a new departure.

On the other hand, in Regina *v.* Frawley,[5] we find Hagarty, C.J., saying :—"If at Confederation we found the municipalities had the power to award imprisonment with hard labour as direct punishment for infractions of by-laws, I would strongly incline to the opinion that by reasonable intendment and implication of law the legislature, who had complete control over their existence, and who could hand over to them the disposition of such police or municipal matters as the licensing and regulation of

Yet, per Hagarty, C.J., we must regard powers possessed by municipalities before Confederation.

[1] 2 O.A.R. at p. 532, 1 Cart. at p. 604, (1878).

[2] 5 See Propositions 1 and 2, and the notes thereto.

[3] 7 O.A.R. at p. 254, 3 Cart. at p. 169, (1882).

[4] That so far as subject-matters of legislation are assigned exclusively to Parliament by the Act, the previously existing powers of legislation in regard to them in the legislatures of what are now the provinces are extinguished is obvious; but the precise meaning of Spragge, C.J., in the passage referred to, in view of the context in which it occurs, seems so obscure as to suggest some misprint or omission in the report of his judgment.

[5] 46 U.C.R. at p. 162, 2 Cart. at p. 601, (1881).

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saloons, must have at least as large a power of dealing with the punishment of 'imprisonment';" the question before the court in that case being whether under No. 15 of section 92, giving power to make laws in relation to "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province," provincial legislatures can make a law imposing hard labour as well as imprisonment.[1]

In determining powers of punishment under No. 15 of sect. 92, B.N.A. Act.

So per Richards, C.J.

In like manner, in Slavin *v.* Village of Orillia,[2] Richards, C.J., delivering the judgment of the Court of Queen's Bench for Ontario, says:—"The British North America Act of 1867 must have been passed on a conference with the delegates from the different provinces, and the various provisions as to the powers and subjects of legislation by the Dominion and local parliaments must have been suggested by these delegates. Their suggestions must have been based on personal knowledge of the various modes in which legislation on those subjects had been had in the various provinces before the Confederation, and, if it had been intended that similar legislation should not have been continued as before by the various provinces, there is no doubt that such intention would have been expressed in the Act."

It must have been intended to continue the legislative powers of the provinces in respect to the subjects assigned to them by the Act.

So per Wilson, J.

And in the case of Regina *v.* Taylor,[3] a case decided a few days later than the case of Slavin *v.* The Village of Orillia, and reported in the same volume of Ontario Queen's Bench Reports, Wilson, J., finds a strong, if not a decisive, argument in favour of his view that the Ontario Act, 37 Vict., c. 32, requiring

[1] As to which, see *supra* pp. 30-1.

[2] 36 U.C.R. at p. 176, 1 Cart. at p. 703, (1875).

[3] 36 U.C.R. at p. 197, (1875).

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wholesale sellers of spirituous liquors to take out a license and pay a duty of fifty dollars therefor, was not *intra vires*, under No. 8 of section 92, as legislation in relation to municipal institutions, in the fact that "there was no statute at the time of the Confederation Act, or at the time of the passing of the Inland Revenue Act of 1867, which gave any right or power to the municipalities to require a trader to take out any other license than a government license —that is, under the Excise or Inland Revenue Act— nor which gave any right or power to any municipality to prohibit the manufacture of beer within its limits or the sale therein of beer so manufactured, so long as the sale was in quantities not less than five gallons or one dozen bottles at one time." And conversely, (at p. 212), he says:—"The Act of the Ontario legislature in imposing a tax for a license on shopkeepers, and tavern-keepers, and others of the like class, for selling by retail, or for continuing the power to municipalities to prohibit the retail of spirituous liquors, is not in excess of the provincial power, although I conceive it to be partly a regulation of trade and commerce, because before and at the time of the confederation of the provinces the existing municipalities in this province possessed that power and privilege, and it was not taken away or qualified in any way by the Confederation Act.[1] That Act, too, was in fact passed, and must be presumed to have been passed, by the Imperial government with a full knowledge at the time of the state of our law which was affected by the Imperial Act

Meaning of "municipal institutions" determined by ante-Confederation powers of municipalities.

They had no power over wholesale liquor licenses.

But they had over retail liquor licenses.

Imperial government knew existing state of law in Canada.

[1] "It may, not without some reason, be contended that there is no inherent connection between the liquor traffic and municipal institutions, which is perfectly true; but there was, if I may so express myself, a constitutional connection. In, I believe, all the provinces the power to regulate, by the granting licenses to sell, intoxicating liquors existed, etc.:" per Burton, J.A., *In re* Local Option Act, 18 O.A.R. at p. 586. See, also, Appendix A.

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then under consideration, and, among other matters, that part of our law which related and relates to municipal institutions, as they existed at that time, because over 'municipal institutions in the province' exclusive power was then conferred by it upon the provincial legislatures."[1]

Per Richards, C.J., again.

And in Severn *v.* The Queen,[2] Richards, C.J., again lays it down as follows :—"In deciding important questions arising under the Act passed by the Imperial parliament for federally uniting the provinces of Canada, Nova Scotia, and New Brunswick, and forming the Dominion of Canada, we must consider the circumstances under which that statute was passed, the condition of the different provinces themselves, their relation to one another, to the mother country, and the state of things existing in the great country adjoining Canada, as well as the systems of government which prevailed in these provinces and countries. The framers of the statute knew the difficulties which had arisen in the great federal republic, and no doubt wished to avoid them in the new government which it was intended to create under that statute." And later on in the same case[3] he says :—"I think we may, without violating any of the rules for construing statutes, look to the legislation which prevailed in any or all of the provinces, in order to enable us to be put in the position of those who framed the laws, and give assistance in interpreting the words used and the object to which they were directed."

Must consider circumstances under which B.N.A. Act passed.

Even the history and circumstances of the United States.

May look at legislation prevailing in any or all of the provinces.

Accordingly, in the two cases above referred to of Slavin *v.* The Village of Orillia and Severn *v.* The

[1] And see per Maclennan, J.A., *In re* Local Option Act, 18 O.A.R. at p. 596, (1891).

[2] 2 S.C.R. at p. 87, 1 Cart. at p. 430, (1878).

[3] 2 S.C.R. at p. 93, 1 Cart. at p. 436.

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Queen, Richards, C.J., seeks to interpret the words "other licenses" in No. 9 of section 92, which confers upon the provincial legislatures power to make laws in relation to "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes," and the words "municipal institutions in the province" in No. 8 of section 92, as meaning such municipal institutions and such licenses as were in existence, and as were imposed in the provinces, or at all events in Ontario (to which he is specially, if not exclusively, referring), prior to the passing of the British North America Act; and he says, at the place last cited:—"The province of Canada, before Confederation, being the largest territorially, having a greater population and raising a larger revenue than either of the other provinces, and being formed by the union of two provinces having different laws, and, to some extent, different interests, would naturally attract attention as the portion of the country where some of the objects of Confederation had been practically worked out." And so in this same case of Severn *v.* The Queen, Henry, J.,[1] says, speaking of the power of local legislatures as to licenses under No. 9 of section 92:—"We must reasonably conclude the legislature meant to restrict the power at some point, and we must determine where that restriction should be imposed, not only from the words of the sub-section in question, but from the tenour and bearing of the whole Act, the state of the law at the time, the peculiar position of the united provinces and the object of their union, with the means for working out the constitution provided."

Thus must be interpreted "other licenses" in No. 9 of sect. 92. See *supra* p. 27, n. 1.

And municipal institutions in No. 8 of sect. 92.

The province of Canada must have attracted special attention.

So, too, per Henry, J.

"Other licenses."

[1] 2 S.C.R. at p. 140, 1 Cart. at p. 485.

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No intention to deprive provinces of revenue from retail licenses.

And in connection with the same subject in the City of Fredericton *v.* The Queen,[1] Henry, J., observes :—" Previously to the union, the revenues derived from licenses for the retail of spirituous liquors, I have reason to believe, in all the provinces, were given to and appropriated by municipal bodies, for municipal purposes, and I must conclude they were intended to continue so, or, at all events, to leave it to the local legislatures to decide whether they should so remain, or be appropriated for other local or provincial purposes."

So, also, per Ramsay, J.

Municipal institutions.

No intention to interfere with them.

In the Corporation of Three Rivers *v.* Sulte,[2] Ramsay, J., says :—" By not taking the state of things existing in at least three of the provinces at the time of passing of the British North America Act and the legislation then in force, we arrive at the inconvenient conclusion that the municipal institutions, as they existed prior to Confederation, cannot be maintained by local legislation ; and that, as in the present case, a municipality would be shorn of most useful powers," (namely, the right to prohibit and regulate the sale of strong drink), " by the simple operation of a surrender of its charter, in order that the legislation may, for convenience sake, be amended or consolidated. It is maintained that to renew these powers there must be joint legislation, if that be lawful, which is open to some doubt."

So per Gwynne, J.

And similarly per Gwynne, J.[3]:—" I cannot doubt that by item No. 8 of section 92 . . . the authors of the scheme of Confederation had in view municipal institutions as they had then already been

[1] 3 S.C.R. at p. 554, 2 Cart. at p. 49, (1880). See generally as to " other licenses " in No. 9 of section 92, *supra* p. 27, note 1.

[2] 5 L.N. at p. 333, 2 Cart. at p. 286, (1882).

[3] S.C. in Appeal, 11 S.C.R. at p. 43, (1885).

organized in some of the provinces." And so per Armour, J., in the Ontario Court of Queen's Bench, in *Re* Harris and Corporation of the City of Hamilton[1]:—"In using the term municipal institutions in the British North America Act, it must have been in the contemplation of the legislature that existing laws relating to municipal institutions should not be affected, and that the local legislatures should have power to alter and amend these laws, especially where, as in the case of the provisions under discussion, the local legislature has only enlarged the scope of a power existing in the Municipal Act at the time of Confederation."

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And Armour, J.

Municipal institutions intended to be preserved.

And in Keefe *v.* McLennan,[2] the Supreme Court of Nova Scotia reasons that because at the time of passing of the British North America Act the law in the province of Nova Scotia relating to the granting of licenses for the sale of intoxicating liquors recognized the right of the Court of Sessions to refuse licenses for the sale of them in small quantities within their respective counties, and seeing that the British North America Act did not repeal the provincial law then in force, therefore:—"When the right of granting licenses was conferred on the provincial legislature, it may very reasonably be presumed that the intention was that the right should continue to be exercised in the same manner as it was then exercised."

So per Supreme Court of Nova Scotia.

Liquor licenses.

Right to impose intended to continue.

In like manner, in the Queen *v.* The Mayor, etc., of Fredericton,[3] Wetmore, J., says:—"To ascertain the jurisdiction given to Parliament in reference to criminal matters, we must look at the law as it stood at the time the British North America Act was

Per Wetmore, J.

[1] 44 U.C.R. at p. 644, 1 Cart. at p. 759, (1879).
[2] 2 R. & C. at p. 12, 2 Cart. at p. 409, (1876).
[3] 3 P. & B. at p. 160, (1879).

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passed." He is there dealing with the Canada Temperance Act, 1878, and maintaining that it cannot be considered as coming under No. 27 of section 91, which gives Parliament power over the criminal law, and he explains his meaning thus :—"When the Imperial Act passed, the importation of liquors, subject to duties, was perfectly legal . . . When the provinces confederated, they had impliedly, if not expressly, guaranteed to them the right to have sold within their borders all descriptions of property legally manufactured or imported . . . If the Dominion parliament can declare the fair prosecution of a legitimate business to be a crime or offence, and thereby obtain a control over it in one instance, it can do the same in respect of every action of the inhabitants, social or otherwise, and every description of property, and thereby entirely subvert every freedom of action and every right of property which the people supposed they had a right to enjoy and exercise. I cannot think the Imperial Act ever did or ever intended to place us in such a position." And so again in Regina *v.* Shaw,[1] three judges of the Court of Queen's Bench of Manitoba agreed in holding that by "criminal law" in No. 27 of section 91 must be understood every act or omission which was regarded as criminal by the law of the provinces when the Union Act was passed, and which was not merely an offence against a by-law of a local authority,[2] Killam and Bain, JJ., remarking

"Criminal law" under No. 27 of sect. 91.

Dominion parliament cannot make a crime of a business perfectly legitimate before Confederation.

So in Manitoba.

"Criminal" in No. 27 of sect. 91 refers to what was criminal before Confederation.

[1] 7 M.R. at p. 518, (1891). Cf. Clement's Canadian Constitution, at pp. 409-10. See, also, *supra* p. 36, *seq.*

[2] See at pp. 520, 524, and 531, and compare per Burton, J.A., in Reg. *v.* Wason, 17 O.A.R. at p. 237, 4 Cart. at pp. 595-6, (1890). In his Parliamentary Procedure and Practice, 2nd ed., at p. 674, Mr. Bourinot says that :—"In the session of 1892 a bill respecting pawnbrokers to prevent them practising extortion was withdrawn by the mover at the request of the Minister of Justice, as it was doubtful if it was within the jurisdiction of the Dominion Parliament," citing Hans., 1882, p. 266.

(at pp. 520 and 531) that how far parliament can exclude provincial or municipal legislation, by creating new crimes, is a different question.[1] Dubuc, J., it may be observed in passing, (S.C., at p. 528), expresses a view which Proposition 35 and the cases there cited might seem to countenance, that although keeping a gambling house is undoubtedly a criminal offence, yet such houses might also be regarded as centres of disorder and immorality in the community which municipal corporations have a right and even a duty to suppress.

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But offences may be criminal and also subject to local police regulation.

Again, in Mercer *v.* Attorney-General of Ontario,[2] Gwynne, J., while declaring that the British North America Act is the sole charter by which the rights claimed by the Dominion and provinces, respectively, can be determined, adds :— "In construing this Act, however, it will be convenient to consider in what manner, and under what designation or form of expression, property of the description in question," (*sc.*, property escheated to the Crown), "had been dealt with in prior Acts of Parliament, and what was the precise condition in which that particular species of property was

Per Gwynne, J.

Rights to escheats since Confederation may depend on incidents of such property before Confederation.

[1] In Reg. *v.* Wason, 17 O.A.R. at p. 241, 4 Cart. at p. 600, Osler, J.A., says :—"I suppose it will not be denied that Parliament may draw into the domain of criminal law an act which has hitherto been punishable only under a provincial statute," referring to Hodge *v.* The Queen, 9 App. Cas. 117, 131, 3 Cart. 144, 161. In the recent Nova Scotia case of Thomas *v.* Haliburton, 26 N.S. at p. 73, (1893), Graham, E.J., speaks as though when Parliament has drawn an act into the domain of criminal law, the right of the provincial legislature to pass laws in regard to such acts ceases. *Sed quære.* See Proposition 35 and the notes thereto.

[2] 5 S.C.R. at p. 675, 3 Cart. at pp. 56-7, (1881). In this case, also, (5 S.C.R. at p. 658, 3 Cart. at p. 44), Henry, J., points out a distinction in this matter, and holds that, in respect to legislative power, it is not safe to argue from powers possessed by the provinces before Confederation as to what powers they now possess, for that the Act alone must be looked at, but it may be proper, in order to interpret the Act, to regard the state of things before Confederation. See at p. 4, *supra.*

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regarded to be, and was at the time of the passing of the British North America Act. By so doing we shall receive light and assistance in construing the latter Act."

So per Ritchie, C.J.

So, too, in Queen *v.* Robertson,[1] Ritchie, C.J., looks to the laws in relation to the fisheries, which the local legislatures were previously to, and at the time of, Confederation in the habit of enacting, for their regulation, preservation, and protection, as throwing light upon the proper interpretation of No. 12 of section 91, whereby power to legislate in relation to sea coast and inland fisheries is vested in the Dominion parliament.[2]

In construing "fisheries" in No. 12, sect. 91.

But must not carry the matter too far.

And we seem to see an example of the absurd length to which a system of interpreting the words in sections 91 and 92 of the British North America Act, conferring legislative powers, by a reference to the state of the law at the time of the Union, may be carried, in *Re* Lake Winnipeg Transportation Lumber & Trading Co.,[3] where it appears (at page 260) that it was contended that section 5, sub-section (*c*), of the Dominion Winding-Up Act, R.S.C., chapter 129, which provides that a company is to be deemed insolvent if it exhibits a statement showing its inability to meet its liabilties, was *ultra vires*, because "while the parliament of Canada has exclusive power to legislate respecting 'insolvency,' all that is meant is that it may enforce and deal with the law of insolvency as it stood on the day the British North America Act was passed, but cannot alter that law." The judge, however, (Taylor,

[1] 6 S.C.R. at p. 121, 2 Cart. at p. 93, (1882).

[2] And so per Gwynne, J., in S.C. 6 S.C.R. at pp. 69-70, 2 Cart. at p. 122, *seq.*; per Fisher, J., in Robertson *v.* Steadman, 3 Pugs. at p. 637, (1876), and in Steadman *v.* Robertson, 2 P. & B. 594.

[3] 7 M.R. 255, (1891).

C.J.), without discussing the matter, decides against the contention. Prop. 4

Finally, to conclude this line of authorities by reference to a case before the highest tribunal, in Attorney-General of Quebec *v.* The Queen Insurance Co.,[1] where the question arose whether an Act of the Quebec legislature, entitled "An Act to compel assurers to take out a license" (39 Vict., chapter 7), was in truth a license Act at all, or whether it was not in reality a Stamp Act, the Privy Council distinctly admitted that, if as a fact it could be shown that by the existing legislation in England and America licenses were constantly granted on similar terms, it was a fair argument to say that No. 9 of section 92, giving legislative power over licenses as therein stated, should be construed with reference to the other subsisting legislation.[2]

The Privy Council.

Seem to admit principle of interpreting by light of English and American legislation.

To turn now to the other side of the question, obvious difficulties arise in relying upon the state of legislation and other circumstances in the provinces prior to Confederation when seeking to interpret the British North America Act. For instance, the state of things existing in some of the provinces prior to Confederation were in some instances different from those existing in others of the provinces, and where this was the case, either the

Difficulties in the matter

State of things before Confederation differed in different provinces.

[1] 3 App. Cas. at p. 1099, 1 Cart. at pp. 128-9, (1878).

[2] For other citations bearing in the same direction as the above, see per Spragge, C.J., in Reg. *v.* Frawley, 7 O.A.R. at p. 267, 2 Cart. at p. 584, (1882); per Cross, J., in Pillow *v.* City of Montreal, M.L.R. 1 Q.B. at p. 410, (1885); per Gwynne, J., Queen *v.* Robertson, 6 S.C.R. at p. 70, 2 Cart. at p. 122, *seq.*, (1880); per Ramsay, J., in Corporation of Three Rivers *v.* Sulte, 5 L.N. at p. 333, 2 Cart. at p. 285, (1882); per Ritchie, C.J., Attorney-General *v.* Mercer, 5 S.C.R. at p. 624, 3 Cart. at p. 17, (1881), in which last case, when before the Privy Council, it may be noted that the Judicial Committee makes some slight reference to the state of things before Confederation, though apparently laying little stress upon it: S.C. 8 App. Cas. at pp. 777-8, 3 Cart. at p. 14.

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interpretation of the British North America Act must vary according to the province to which it is being applied, or we must select some particular province or provinces in seeking for light in construing it, or, lastly, we must take up the bold and comprehensive position assumed by Dorion, C.J., in the Quebec Court of Queen's Bench, in Cooey *v.* The Corporation of the County of Brome,[1] where he says:—"In the absence of any expression to restrict the powers so conferred," (*sc.*, by Nos. 8 and 16 of section 92 of the British North America Act), "they must be understood to comprise all those matters which, at the time the Union was effected, had been considered by the existing legislatures as belonging to municipal institutions, and as being of a local or provincial character." And see the words of Armour, J., in *Re* Harris and the Corporation of the City of Hamilton, quoted *supra* p. 49.

Per Dorion, C.J.

Per Strong, J.

This difficulty in the matter is pointed out by Strong, J., in his judgment in Severn *v.* The Queen[2] where he says, referring to the reasoning of Richards, C.J., in this case, and in Slavin *v.* The Village of Orillia, above cited[3]:—"I am unable to accede to the doctrine that we are to attribute to the words 'other licenses' the same meaning as though the expression had been 'such other licenses as were formerly imposed in the provinces,' or equivalent words. The result of such construction would be that the same words would have a different meaning in different provinces, and that

"Other licenses." No. 9, sect. 92. See *supra*, p. 27, n. 1.

[1] This judgment does not appear to be anywhere reported, but the above passage is quoted in Lepine *v.* Laurent, 17 Q.L.R. at p. 229.

[2] 2 S.C.R. at pp. 109-10, 1 Cart. at p. 453, (1878). In the Debates before Confederation in the parliament of Canada, Attorney-General Macdonald remarks (p. 41):—"At present there is a good deal of diversity. In one of the colonies, for instance, they have no municipal system at all. In another the municipal system is merely permissive, and has not been adopted to any extent."

[3] 36 U.C.R. at p. 176, 1 Cart. at p. 703. See *supra* p. 44.

the several provincial legislatures would have different powers of taxation, though the power is included in the same grant. This, it appears to me, would be in direct contravention of the principle which forbids a different interpretation being given to a general law in different localities, however much local laws or usages may favour such diverse interpretations. However, apart from authority, I cannot think this was the intention of the Imperial parliament. I think everything indicates that co-equal and co-ordinate legislative powers in every particular were conferred by the Act on the provinces,[1] and I know of no principle of interpretation which would authorize such a reading of the British North America Act as that proposed. Had such been the design of the framers of the Act, the meaning of which I can only discover from the words in which it is expressed, we should have found the case provided for."[2] And Ritchie, C.J., observes in the same case[3]:— "With all respect for the province of Ontario, I do not think the Act should be read by the light of an Ontario candle alone, that is, by the state of the law at the time of Confederation in that province, without reference to what the law was in other parts of the Dominion. If the law at the time of Confederation is to be looked at as affording a key to the construction of the statute, then the state of the law throughout the Dominion must, I think, be looked at, and not that of any individual province, as I think it clear that the statute was to have a uniform construction throughout the whole Dominion, and

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Powers of provincial legislatures are co-equal and co-ordinate.

Per Ritchie, C.J.

Cannot read B.N.A. Act by light of an Ontario candle alone.

Cannot attribute different powers to different provinces.

[1] See Proposition 65 and the notes thereto.

[2] And see to the same effect per Begbie, C.J., in Weiler *v.* Richards, 26 C.L.J. 338, at p. 340.

[3] 2 S.C.R. at p. 99, 1 Cart. at p. 442.

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the powers of all the local legislatures were to be alike."[1] He also adds in the same passage:—

Nor can state of things in the United States throw any light.

"We are not, in my opinion, to look to the state of the law at the time of Confederation in the adjoining Republic, or the difficulties there experienced, as affording any guide to the construction of the British North America Act."

Per Taschereau, J.

It is indeed difficult to dissent from the dictum of Taschereau, J., in Attorney-General *v.* Mercer[2]:—

Argument based on ante-Confederation law, if sound, must apply equally to all provinces.

"It seems to me that any argument which, under the British North America Act, does not and cannot apply equally to all the provinces must be contrary to the spirit and intent of the British North America Act."

But perhaps state of law in one or other province may sometimes justify a Dominion enactment as simply conforming to it.

But that the state of law in some one or other province either before or after Confederation may sometimes properly be regarded as showing that some provision in a Dominion Act is merely to be considered as a conforming on the part of the Dominion parliament with the provincial law *in eâdem materiâ*, and therefore should not be held to be *ultra vires*, seems to have been the view of Hagarty, C.J.O., in McArthur *v.* Northern & Pacific Junction Railway Co.,[3] where the question was, whether section 27 of R.S.C., c. 109, imposing a six months' limitation for actions for injuries sustained by railways was *ultra vires* or not, and the learned Chief Justice says:—

Per Hagarty, C.J.O.

"When we find the Dominion Act using the same words as to the six months' limitation as appear in the Consolidated Statutes of Canada and also in the Ontario Act, we should regard them as

[1] See Proposition 65 and the notes thereto.

[2] 5 S.C.R. at p. 669, 3 Cart. at p. 52, (1881).

[3] 17 O.A.R. at. p. 91, 4 Cart. at p. 564, (1890).

simply conforming to the law as existing in Ontario applicable to railways, and not as adopting some new limitation or bar to the rights of parties. If the Dominion Act had said, 'subject to the same limitation as to bringing actions for indemnity as prevails in Ontario,' it could hardly be said that there was any attempt at interference with the local laws." But, with all respect, it is submitted that such a provision in a Dominion Act must be justified, if at all, under the principle embodied in Proposition 37, *infra*, and cannot be upheld on such ground of conformity to provincial law as suggested.

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Sed quære.

It may be worth mentioning, also, that in the argument in Hodge *v.* The Queen before the Judicial Committee of the Privy Council in November, 1883,[1] the following took place with reference to the contention that by virtue of No. 8 of section 92 of the British North America Act, "municipal institutions in the province," the provincial legislatures had power to regulate the sale of liquors.

The Privy Council.

Argument in Hodge *v.* The Queen.

Mr. Jeune:—"The circumstance that the municipalities exercised the power before Confederation proves nothing."

Powers of municipalities before Confederation cannot decide meaning of No. 8 of sect. 92.

Sir Robert Couch:—"It does not show it was part of the municipal institutions."

Sir Robert Collier:—"It is not a question of what they exercised before Confederation. We have only to deal with the statute."

Mr. Jeune:—"That is what I submit to your lordships, that it is a question of the meaning of this Act of Parliament, construed, as I venture to think, as an Act of Parliament and not as a charter."[2]

The statute governs.

[1] Dom. Sess. Papers, 1884, Vol. 17, No. 30, at p. 67.

[2] See Proposition 3 and the notes thereto.

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And so, again, in the argument before the Privy Council in regard to the Dominion License Acts, 1883 and 1884,[1] where Sir Farrer Herschel, of counsel for the Dominion, discussing No. 8 of section 92 of the British North America Act, whereby the exclusive power of making laws in relation to municipal institutions in the province is assigned to the local legislature, makes some weighty observations bearing on the matter in hand (pp. 82-3):—"That cannot mean you may establish municipal bodies, and give them any and every power you please, or even give them every power which has ever been exercised by municipal bodies in Canada. The argument in the Court below was this:—You find that some municipal bodies in some of the provinces of Canada before the Dominion Act have dealt with this question of the liquor traffic. Therefore when you give exclusive legislation with regard to municipal institutions, you give them exclusive power to create municipal bodies, and you give those municipal bodies so created exclusive power over this particular subject. My Lords, I apprehend that that really is an argument that will not bear investigation, because, of course, the very object of this Act was to take away from the provincial legislatures some of the powers which they had before possessed, and to confer those powers upon the central Parliament, and therefore to say that they must necessarily have all the power of legislation which before they could exercise through their municipal bodies is an argument which cannot be sustained. I should submit that the

So in the argument before the Privy Council in the matter of the Dominion license Acts.

"Municipal institutions."

Does not mean legislature can give municipalities all powers they had before Confederation.

Object of the B.N.A. Act was to take away some provincial powers.

[1]The writer has had an opportunity of studying a transcript from the shorthand notes of this most able argument, conducted by Sir Farrer Herschel (now Lord Chancellor) on the one side, and Sir Horace Davey on the other, and several extracts from it will be found in this book.

exclusive legislation in regard to municipal institutions enables them to create municipal institutions and to give those municipal bodies any powers which come fairly within the subjects with which they are entitled to deal, but that unless you can find from some other provisions here that it is a subject with which they are entitled to deal, the power to create municipal institutions cannot give them the power to enable those municipal institutions to deal exclusively with a subject of legislation which is nowhere else exclusively committed to them." Whereupon the Lord Chancellor observes that he would have thought that No. 8 of section 92 meant the creation of municipal institutions, how many they were to consist of, and how they were to be elected.

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Legislatures can only give municipalities powers on subjects which they themselves are entitled to deal with.

View of the Lord Chancellor as to meaning of "municipal institutions."

And these words of Sir Farrer Herschel are curiously re-echoed by Burton, J.A., in *In re* Local Option Act,[1] where he says:—"It does not suggest itself to my mind as at all conclusive in favour of the power of the local legislature to deal with the subject of prohibition under the words 'municipal institutions,' that provisions in reference to that subject were, at the time of the passing of the Confederation Act, to be found in our own municipal Acts, and had been so for many years. It must not be forgotten that the legislature of the province of Canada which passed those Acts had plenary powers of legislation, including the power to regulate trade and commerce and to deal with the criminal law, and, in fact, all the powers which are now distributed between the parliament of the Dominion, and the legislatures of the provinces. Having that power, it was clearly competent to the

Sir F. Herschel's words supported by those of Burton, J.A.

In re Local Option Act.

Ante-Confederation legislatures had plenary powers.

[1] 18 O.A.R. at p. 585, (1891).

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legislature to confide to a municipal council or any other body of its own creation, or to individuals of its selection, authority to make by-laws or resolutions as to subjects specified in the enactment, with the object of carrying it into effect; and the provision in question being found, therefore, within a municipal Act of the provinces furnishes no conclusive evidence that by the words 'municipal institutions' it was intended to confer every power which might be contained in such an Act upon the legislatures of the provinces. It is proper to inquire, therefore, what was the extent of the grant given under that designation. Does it mean only the creation and erection of municipalities with such powers as are of the essence of municipal institutions, and necessarily incident to and essential to their existence, or does it include the powers and functions which, at the time of Confederation, were ordinarily exercised to a greater or less extent by the municipalities of all the provinces?" And he apparently indicates the latter as his own view.

And could confer such on municipalities.

Does not follow provincial legislatures can confer such powers now.

They would seem only able to confer such as were ordinarily exercised in all the provinces before Confederation.

And this may, perhaps, be taken to be the view of Hagarty, C.J.O.,[1] where he says:—"It may be safely said that there is no apparent intention in the Confederation Act to curtail or interfere with the existing general powers of municipal councils unless the Act plainly transfers any of such existing powers to the Dominion jurisdiction." He also deems, it may be observed,[2] that it is a good argument to

So per Hagarty, C.J.O.

[1] S.C. 18 O.A.R. at p. 580.

[2] S.C. at p. 581. In the Quebec case of Corporation of Three Rivers *v.* Major, 8 Q.L.R. at p. 189, (1881), Ramsay, J., says:—"I should have little hesitation in saying that 'municipal institutions in the province,' within the meaning of the Imperial parliament, could only be those existing over almost the whole of confederated Canada at the time of the federal union. I know no abstract definition. But the question hardly arises here."

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show that the power granted to township municipalities to prohibit the retail sale of liquor does not, "by any reasonable construction, come within the words 'trade and commerce' as used in the Confederation Act," that "if such a construction prevailed, it would seem to interfere most extensively with many powers granted by our Municipal Acts. They are full of provisions, not only for licensing, but for regulating, governing, and, in many cases, preventing acts locally affecting trade and commerce in the locality, such as auction sales of goods, hawkers and peddlers, regulating ferries . . . for regulating and preventing various manufactories; preventing dangerous trades, forestalling and regrating. . . . All these powers existed at Confederation, and I am of opinion that there can be no interference with such power by any fair interpretation of the words 'trade and commerce.'"[1]

Regulation of trade and commerce in No. 2, sect. 91, not intended to cover such municipal powers.

E.g., of regulating or prohibiting liquor-selling.

And in the argument in Hodge *v.* The Queen, before the Privy Council, another point is suggested by some words of Mr. Jeune, who was of counsel for the appellant, namely, that the course and character of legislation in England itself at the time of Confederation may, in some cases, throw light upon the proper interpretation of the British North America Act. Mr. Jeune there, in discussing the question "whether the regulation of the liquor traffic, which, in England, would be commonly known as the liquor laws, are laws which the Dominion ought to pass, or laws which the province ought to pass," observes:—"The licensing laws, or, as one speaks generally, the liquor laws, are laws which, of course, in England, have always been carefully reserved for the jurisdiction of the Imperial parliament up to this time, and they were

Argument before Privy Council in Hodge *v.* The Queen.

English legislation may sometimes have to be regarded in interpreting B.N.A. Act.

As, for example, in respect to liquor laws.

[1] As to this matter of the regulation of trade and commerce, see the notes to Proposition 49, *infra*.

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laws which at the time the Confederation Act was passed, in the English constitution, were reserved for the consideration of the English parliament alone. The English parliament always has, up to this time, whatever some people may think ought to be done, treated the regulation of the liquor traffic—as indeed it is—as a matter of general public interest, and not as one either in the permission of the traffic, or the prohibition of the traffic, concerning localities only, and to be dealt with solely by localities, and therefore *primâ facie* one would naturally suppose that a matter of this kind would be one which we have good reason to think would be left for the administration of the legislature of the Dominion as opposed to the legislatures of the provinces."[1]

Not regarded as a local matter in England.

But, after all, state of things in Canada more important.

But Mr. Davey, of counsel for the respondent, naturally rejoins to this[2]:—"If in Canada, as well before the Confederation as since, that licensing power was exercised, not by the supreme legislature, but by the municipal authorities, it is none the less a municipal institution, because, in Great Britain, the municipality does not exercise that function."

But Dorion, C.J., looks to England as to licenses in No. 9 of sect. 92, B.N.A. Act.

Yet in Bank of Toronto *v.* Lambe,[3] in order to ascertain what is the character of the duties which the provinces are authorized to raise by means of the licenses in No. 9 of section 92, Dorion, C.J., deems it necessary to enquire, and does enquire at great length, "how these license duties and other similar taxes were considered in England before and at the time the British North America Act was passed," and observes that :—"In the absence of any expressions to distinguish them from the same

[1] Dom. Sess. Pap., 1884, Vol. 17, No. 30, p. 61.

[2] *Ibid.*, at p. 92.

[3] M.L.R. 1 Q.B. at p. 139, *seq.*, 4 Cart. at p. 37, *seq.*, (1885), *sub nom.* 'North British and Mercantile Ins. Co. *v.* Lambe.'

imposts levied in England, we must hold that they were of the same character."[1] Prop. 4

And again, in the argument before the Judicial Committee on the reference as to the Ontario Act respecting assignment for creditors, Attorney-General of Ontario *v.* Attorney-General of Canada,[2] which took place in November, 1893, Sir R. Webster, who was of counsel for the Dominion parliament, observed:—"This is after all an Imperial Act," (*sc.*, the British North America Act). "This is an Act which uses language which may to a certain extent be more apt in relation to the state of things in Great Britain or England than in the provinces." And the law officers of the Crown in England, in 1869-70, when the question as to the power to legislate upon publication of banns, and marriage licenses, was referred to them, observe in their Opinion:—"The phrase, 'The laws respecting the solemnization of marriages in England,' occurs in the preamble of the Marriage Act (4 Geo. IV., c. 76), an Act which is very largely concerned with matters relating to banns and licenses, and this is, therefore, a strong authority to show that the same words used in the British North America Act, 1867, were intended to have the same meaning."[3]

So in the argument before the Privy Council as to bankruptcy and insolvency.

Sir R. Webster urges state of things in England must be considered.

So, also, law officers of the Crown as to meaning of "solemnization of marriage."

And in connection with the subject which we have been discussing, it is proper to notice those cases which deal with the question how far it is right to look to the rights and privileges of the colonial legislatures as they existed prior to 1867 in order to

[1] M.L.R. 1 Q.B. at p. 141, 4 Cart. at p. 39.

[2] [1894] A.C. 189. The writer has had an opportunity of studying a transcript from the shorthand notes of this argument.

[3] Dom. Sess. Pap., 1877, No. 89, p. 340; quoted Doutre on the Constitution of Canada, p. 238.

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determine what rights and privileges the provincial legislatures have under the British North America Act.[1]

In *Ex parte* Dansereau[2] this subject, in connection with the local legislature of the province of Quebec, was dealt with by several of the judges.[3] Thus Sanborn, J., says[4]:—"The late province of Lower Canada was constituted a separate province by the Act of 1791, with a governor, a legislative council, and a legislative assembly, and it has never lost its identity . . . This Act" (*sc.*, the British North America Act), "according to my understanding of it, distributed powers already existing, to be exercised within their prescribed limits, to different legislatures constituting one central legislature and several subordinate ones, all upon the same model, without destroying the autonomy of the provinces, or breaking the continuity of the prescriptive rights and traditions of the respective provinces. In a

As to inherent rights of provincial legislatures, other than law-making powers under B.N.A. Act.

Per Sanborn, J.

Looks to powers existing before Confederation.

[1] As to it not being in the power of provincial legislatures to pass Acts defining their own privileges and powers, see Hodgins' Provincial Legislation, Vol. 1, pp. 48-61, 137, 236, 375, 596; *ib.*, Vol. 2, pp. 86, 93. But see Clement's Canadian Constitution, at pp. 326-8. As to the power of the Dominion parliament in this respect, see section 18 of the British North America Act, and Mr. Clement's notes thereto: *ib.*, at p. 262, *seq.* See, also, *ib.* at pp. 280-1; and the notes to Proposition 66, *infra.*

[2] 19 L.C.J. 210, 2 Cart. 165, (1875).

[3] As to the judgment of Dorion, C.J., in this case, in his pamphlet entitled "Letters upon the Interpretation of the Federal Constitution," (first letter), before referred to, Mr. Justice Loranger, (at pp. 41-2), quotes passages as from that judgment which are not to be found in it as reported in 19 L.C.J. 210, 2 Cart. 165. According to Mr. Justice Loranger, Dorion, C.J., used the following words:—"I do not read that the intention of the new constitution was to begin an entirely new form of government, or to deprive the legislature of any of the powers which existed before, but to effect a division of them. Some of them are given to the local legislatures, but I find none of them curtailed. In substituting the new legislation for the old, the new legislature has, in all those things which are special to the province of Quebec, all the rights of the old legislature, and they must continue to remain in the province of Quebec, as they existed under the old constitution."

[4] 19 L.C.J. at pp. 235-6, 2 Cart. at pp. 197-8.

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certain sense the powers of the Federal parliament were derived from the provinces, subject, of course, to the whole being a colonial dependency of the British Crown. The provinces of Quebec and Ontario are, by the sixth section of the Act, declared to be the same that formerly comprised Upper and Lower Canada. This recognizes their previous existence prior to the Union Act of 1840. All through the Act these provinces are recognized as having a previous existence and a constitutional history, upon which the new fabric is based. Their laws remain unchanged, and the constitution is preserved. The offices are the same in name and duties, except as to the office of Lieutenant-Governor, who is placed in the same relation to the province of Quebec that the Governor-General sustained to the late province of Canada. I think it would be a great mistake to ignore the past governmental powers conferred upon, and exercised in, the province, now called Quebec, in determining the nature and privileges of the legislative assembly of the province." Again, Monk, J., observes[1]:— "It seems plain to my mind that the House does possess from necessity, and by implied and inherent prerogative, independent of usage or precedent, the powers claimed in the present instance," (namely, the power to examine witnesses and punish persons who disobey such summons, and to regulate this right by statute). "But if we hesitate in regard to this view of the subject, does there not exist a usage —a jurisprudence, so to speak—in matters relating to the powers of the local parliament of Quebec, which must go far to remove all doubt in reference to these powers, as claimed in the present instance? . . . And, first, I would remark that we need not,

B.N.A. Act did not break continuity of the prescriptive rights of provinces.

It recognizes the previous existence of the provinces.

We must not ignore the past governmental powers.

So per Monk, J.

Powers by inherent necessity.

[1]S.C. 19 L.C.J. at pp. 245-6, 2 Cart. at pp. 215-17.

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we cannot, go back to the middle ages exploring and searching for a *lex et consuetudo parliamenti* . . .

At any rate provincial legislatures can claim such powers by usage.

In the United States they date the laws and usages of Congress from the formation of their Constitution, and we may safely, and must from necessity, trace ours from the organization of our government under the British Crown to the present day . . . We go back scarcely a century, but even within that short period we find the laws, usages, and powers of our parliament constantly and decisively asserted. We have the case of Mr. Young in 1793, that of Mr. Monk in 1817, those of Messrs. Tracey and Duvernay in 1832, of Brodeur and Levoie in later times. . . . There are more and many other instances, not necessary to mention here, in which this inherent and necessary power of parliament has been repeatedly exercised. Some of these cases were questioned—were brought before judicial authority—but the course and proceedings of parliament were sustained, or, at least, have never been overruled. All this looks like a *lex et consuetudo parliamenti* . . . Inasmuch as the Confederation Act, in this respect at least, has left us where we were—that is, independent, supreme, within our own sphere of legislation—it cannot be said to have interfered with these laws and usages of parliament such as they existed in 1867. Thus, then, as I view this part of the case before us, the authority and inherent privileges of the House of Assembly have virtually continued, though occasionally in abeyance, through all the changes of our Constitution, and they exist now in as full force as they did for a long time, and immediately previous to Confederation."

Traced from first organization of the colonial governments under the British Crown.

A sort of *lex et consuetudo parliamenti.*

Not interfered with by B.N.A. Act.

On the other hand, in Cotte's case,[1] in which

[1] 19 L.C.J. at p. 215, 2 Cart. at pp. 223-4, (1875). See as to the view here expressed by Ramsay, J., *supra* p. 10, *seq.*

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the same question arose as in *Ex parte* Dansereau, above referred to, Ramsay, J., says:—"But even were the usage established, it could not be extended from one body to another. Thus Young's case in 1793 might perhaps justify Monk's case in 1817, and Tracey and Duvernay's cases in 1832, but they could be no foundation for the cases under the constitution of the late province of Quebec. In 1838 the constitution under the Act of the 31 Geo. III. was suspended in consequence of an armed insurrection, a new constitution was substituted, which subsisted for three years, and the old constitution of Lower Canada was never restored. Again, the constitution of 1840 was abolished at the request of the legislature of Canada, and a totally new constitution was substituted therefor. In addition to this, there is no analogy between the legislative assembly of the province of Quebec and any of the legislative bodies which have subsisted since 1791. They had all general power to legislate for the peace, welfare, and good government of the province, (14 Geo. III., c. 83, s. 12; 31 Geo. III., c. 31, s. 2; 1 Vict., c. 91, s. 3; 3-4 Vict., c. 35, s. 3), whereas the powers of the legislature of the province of Quebec are strictly limited to specified objects . . . They are markedly called legislatures in contradistinction to Parliament. The Queen forms no part of these legislatures, although through her representative the Governor-General she appoints the Lieutenant-Governors."[1]

But Ramsay, J., takes a different view.

Old Constitution in Lower Canada suspended in 1838.

Constitution of 1840 abolished at Confederation.

Ante-Confederation legislatures had general powers.

Present provincial legislatures have only limited ones.

But, after all, this is a different question from that of the proper way to construe the B.N.A. Act.

There is a clear distinction, however, between the question of the right to rely upon the state of legislation in the various provinces prior to Confederation as determining the proper construction

[1] But as to this last statement, see Proposition 7 and the notes thereto.

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of the clauses of the British North America Act respecting the distribution of legislative powers, and the question whether or not the present provincial legislatures do or do not retain the like privileges and powers (apart, of course, from their law-making powers under sections 91 and 92) as the legislatures of the several provinces had prior to Confederation. As is said by Ritchie, C.J., in Attorney-General *v.* Mercer,[1] special pains appear to have been taken by the framers of our present constitution to preserve the autonomy of the provinces so far as it could be consistently with a federal union; and the words of section 129 must not be overlooked, that "except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made, etc."

No doubt autonomy of provinces has so far as possible been preserved.

Sect. 129 of B.N.A. Act.

Landers *v.* Woodsworth.

In Landers *v.* Woodsworth,[2] in which the question before the Court was, whether the existing legislature of Nova Scotia has, in the absence of an express grant, any power to remove from the House one of its members for contempt, though not actually destroying the peace of the House, (a case referred to more at length in the notes to Proposition 66), it may be observed that the judges of the Supreme Court of Canada do not at all discuss the question whether the legislature of Nova Scotia

The question not dealt with there.

[1] 5 S.C.R. at p. 637, 3 Cart. at p. 28, (1881). And see Proposition 64 and the notes thereto.

[2] 2 S.C.R. at p. 158, (1878).

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prior to Confederation did or did not exercise any such power, though they, of course, deal with the authorities as to the general question of the power of colonial legislative bodies in such respect. It may be gathered, however, from the argument[1] that the legislature of Nova Scotia was not shown to have exercised any such power prior to Confederation, and that therefore the point in this shape did not arise, for counsel is reported as saying:—"There are cases decided here which favour the contention that it has been the practice of Houses of Assembly in other British North American colonies to consider the House the sole and exclusive judge of its own privileges and what is a breach thereof, and its action is conclusive upon courts of law." They then cite *Ex parte* Dansereau[2] and the Lower Canadian cases referred to in it, and proceed :—"If the legislative assembly of the province of Quebec can exercise that right, surely it cannot be denied to the legislative assembly of Nova Scotia."

Apparently because the Nova Scotia legislature had no such powers as those in question before Confederation.

In conclusion, it may be observed that whatever difficulties may arise in attempting to arrive at the interpretation of the various classes of subjects of legislation enumerated in section 92 of the British North America Act, by reference to the state of legislation in the various provinces before Confederation, there are obviously other parts of the Act where no such difficulties arise, and where it must be right to consider the state of things existing before Confederation. A good example of this is afforded in Ganong *v.* Bayley,[3] where the proper

State of things before Confederation clearly must be regarded in interpreting some parts of B.N.A. Act.

[1] 2 S.C.R. at p. 172.

[2] 19 L.C.J. 210, 2 Cart. 165.

[3] 1 P. & B. 324, 2 Cart. 509, (1877).

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For example, sect. 96.

interpretation of section 96 came before the New Brunswick Supreme Court. This section provides that "the Governor-General shall appoint the judges of the Superior, District, and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick," and the question was, whether an Act of the legislature of New Brunswick (39 Vict., ch. 5) whereby it was provided that Courts should be established for the trial of civil causes, where small amounts were involved, before Commissioners appointed by the Lieutenant-Governor in Council, and known as "Parish Courts," was *intra vires*. The Court agreed in interpreting section 96 by a reference to Courts existing before Confederation. Thus Weldon, J., says[1]:—"At the time of the passing of the Confederation Act, there were Superior Courts in all the provinces which were embraced in the Confederacy. There were District Courts in Canada. In Lower Canada there were the Districts of Gaspé, of Saguenay, and of Chicoutimi; there were the County Courts existing in Upper Canada, and (*sic*) subsequently were established in New Brunswick, Nova Scotia, and Prince Edward Island. It appears to me these were the Courts that the Governor-General was to appoint the judges to, when established, or as vacancies may occur, and to provide for them salaries, allowances, and pensions. There were, also, at the time of the passing of the Confederation Act, Commissioners' Courts for the summary trial of small causes in what is now the province of Quebec, and there were Division Courts in Ontario. No reference is made to them in the said Act. The several Acts estab-

Must be interpreted by reference to ante-Confederation Courts, and judges.

Per Weldon, J.

County Courts and District Courts.

Commissioners' Courts and Division Courts.

[1] 1 P. & B. at p. 326, 2 Cart. at p. 512.

lishing these small Courts in the several provinces, prior to Confederation, also provided for the appointment of officers thereof, by the several local executives, and were not referred to or expressly provided for in the said Act." And the majority of the Court held that, as the Parish Courts in question were not such Courts as were referred to in section 96, there was nothing to prevent the local legislature authorizing the Lieutenant-Governor to appoint judges to them by virtue of the power of legislation given by section 92, No. 14, in relation to the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts.

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Parish Courts in New Brunswick.

PROPOSITIONS 5 AND 6.

5. The prerogative of the Crown runs in the colonies to the same extent as in England, and no distinction can properly be drawn between the rights and prerogatives of the Crown suing in respect of Imperial rights, and the rights of the Crown with regard to the colonies.

6. Her Majesty's prerogative rights over the Dominion of Canada as the fountain of honour have not been in the least degree impaired or lessened by the British North America Act.[1]

Per Ritchie, C.J., and the Supreme Court.

The first of the above Propositions is taken from the words of Ritchie, C.J., in Maritime Bank *v.* The Queen,[2] in which case the Supreme Court of Canada again held, in accordance with their previous decision in The Queen *v.* The Bank of Nova Scotia,[3] that the Crown as represented by the

The Crown's priority as a creditor.

[1] Propositions 5 to 11 inclusive, and the notes thereto, may well be studied together, having all of them to do with the general subject of the legal position of the Crown in Canada. On the subject of the prerogative of the Crown in colonial legislation, reference may be made to an article exhibiting much research by Mr. Hodgins, Q.C., in Rose-Belford's *Canadian Monthly*, vol. 5, p. 385, *seq.*

[2] 17 S.C.R. at pp. 661-2, 4 Cart. at pp. 411-2, (1889).

[3] 11 S.C.R. 1, 4 Cart. 391, (1885). For a statutory recognition of this prerogative, see 33 Hen. VIII., c. 39, s. 74.

Dominion government had, when claiming in New Brunswick as a creditor of the Maritime Bank, priority over other creditors of equal degree, according to the general rule of English law. Prop. 5-6

In the argument in the case of the Provincial Government of the Province of New Brunswick *v.* The Liquidators of the Maritime Bank,[1] before the New Brunswick Supreme Court, the word "prerogative," in the sense in which it applies to such a case as this, is defined as "the special pre-eminence which the Crown enjoys alone, not in common with the subjects, but in preference to and before subjects." This definition is obviously taken from that of Sir William Blackstone,[2] which is as follows:—"By the word 'prerogative' we usually understand that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity. It signifies, in its etymology (from præ and rogo), something that is required or demanded before or in preference to all others . . . And, therefore, Finch (L. 85) lays it down as a maxim that the prerogative is that law in the case of the King, which is law in no case of the subject." But it may be observed that the above definition given in the argument in the case of the Provincial Government of the Province of New Brunswick *v.* The Liquidators of the Maritime Bank has the advantage of being freed from that objection which Sir William Anson in his recent work on "The Crown"[3] finds to Blackstone's definition,

Definitions of the word "prerogative."

Sir William Blackstone.

Sir William Anson.

[1] 27 N.B. at p. 381, (1888).

[2] 1 Bl. Com. at p. 239, cited in Chitty on the Law of the Prerogative, at p. 4.

[3] The Law and Custom of the Constitution, Part 2, The Crown, by Sir W. R. Anson, at p. 2. At pp. 3-5, Sir W. Anson throws a great

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namely, that it is not right to speak of these prerogatives as out of the ordinary course of the common law, because they are a part of the common law, and as capable of ascertainment and definition by the Courts as any other part of the unwritten law of the land.

Per Gwynne, J., in Maritime Bank *v.* The Queen.

In the case above mentioned of The Maritime Bank *v.* The Queen,[1] however, Gwynne, J., expresses the view that, seeing that under legislation existing at the time of Confederation, no such prerogative could be claimed by the Crown in the old province of Canada as was claimed in that case, and seeing that the British North America Act did not repeal or annul the provisions of the statute law of the old province of Canada, therefore clearly the Dominion government has not, in virtue of Her Majesty's royal prerogative or otherwise, any right to have a debt due to it paid in priority of debts due by the same debtor to other creditors where such debt accrues due to the Dominion government within either Ontario or Quebec, formerly constituting, as they did, the old province of Canada; and that, therefore, the Dominion government could not claim priority in respect to a debt arising, as in the case before him, by reason of a deposit made in the Maritime Bank at its place of business in St. John, New Brunswick, for he says:—"The prerogative right of claiming priority in payment of debts due to the Dominion government must, in my opinion, exist throughout the whole of the Dominion, if it

Refers to law of old province of Canada.

And denies to Crown in right of the Dominion any prerogative priority.

deal of light on the subject of the royal prerogative, by grouping the prerogatives of the Crown under three heads:—Its powers in the executive and legislative departments of government; its rights as feudal lord; and the outcome of attributes ascribed to the Crown by the mediæval lawyers.

[1] 17 S.C.R. at p. 677, *seq.*, 4 Cart. at p. 416, *seq.*

exists at all . . . In view of the fact that, at the time of the passing of the British North America Act, the particular prerogative right insisted upon did not exist within the late province of Canada, and in view of the fact that there is no provision in the Act annexing the right to the constitution of the Dominion, and of the fact that the prerogative does not now or since the passing of the British North America Act exist in those parts of the Dominion consisting of the provinces of Quebec and Ontario, and, lastly, in view of the fact that there is nothing in the Act requiring or justifying the conclusion that such an incongruity exists in the constitutional charter of the Dominion as that the Dominion government should have a right to invoke and exercise a royal prerogative in one of its provinces which it could not exercise in all the others, the necessary implication, in my opinion, arises that the Dominion government has no right to invoke or exercise the particular prerogative relied upon in any part of the Dominion. By so holding we shall be acting more in harmony with the ideas prevailing in the present day—with the spirit of the age—and, in my opinion, with the letter and spirit of the constitutional charter of the Dominion."

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Since such cannot exist in Ontario or Quebec.

None of the other judges, however, express a similar view, or deal at all with the point taken as to the law of the old province of Canada, or as to the Dominion government being possessed of prerogative rights in respect to matters arising in some of the provinces which it may not be possessed of in respect to similar matters arising in others, except Patterson, J., who disposes of it by saying[1]:—" The

Majority of Court, however, uphold such prerogative right in New Brunswick.

[1] 17 S.C.R. at p. 684, 4 Cart. at p. 424.

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general rule, to the extent to which it was in question before this Court in The Queen *v.* The Bank of Nova Scotia, 11 S.C.R. 1, does not strike me as being since that decision open to controversy in this Court."

Following Queen *v.* Bank of Nova Scotia.

Gwynne, J., cites, in connection with his remarks just quoted, the case of The Exchange Bank of Canada *v.* The Queen.[1] There the Minister of Finance and the Receiver-General of Canada made claim in the province of Quebec against the estate of the Exchange Bank of Canada in liquidation, in the name of the Queen, for the amount of two deposits made on behalf of the Dominion of Canada, and also for the balance due on a banking account of the Dominion with the Exchange Bank, claiming payment in priority to all other creditors. The deposits were made in 1883. In like manner, the Attorney-General of Quebec claimed a right to payment in priority to all other creditors of the amount of a deposit made in the bank on behalf of the province of Quebec also in 1883. The bank had its principal office at Montreal. The Privy Council held that the Crown was bound by the codes of Lower Canada, and could claim no priority except what was allowed by them, and, that being so, it was not entitled in the case before them to priority of payment over the other ordinary creditors of the bank.

Exchange Bank *v.* The Queen.

Privy Council holds no such prerogative exists in Quebec by reason of provisions of local codes.

The general rule, however, seems, as Patterson, J., says in the passage just cited from The Maritime Bank *v.* The Queen, to be conclusively established in The Queen *v.* The Bank of Nova Scotia.[2] There the Bank of Prince Edward Island, incor-

Queen *v.* Bank of Nova Scotia.

[1] 11 App. Cas. 157, (1886).

[2] 11 S.C.R. 1, 4 Cart. 391, (1885).

porated by the legislature of the island in 1844, being in process of winding up, and indebted to Her Majesty in certain public moneys of Canada, which had been deposited by several departments of the Dominion government to the credit of the Receiver-General, it was held that Her Majesty in her government of Canada, claiming as a simple contract creditor, had a right over other creditors of equal degree. Prop. 5-6

Establishes the right in Prince Edward Island.

The judgment of Mr. Justice Peters, the judge of first instance, does not appear to have been reported,[1] but he decided that the prerogative right to be paid in full was in the government of Prince Edward Island to the exclusion of the Queen in her government of Canada. And in the argument before the Supreme Court of Canada, the counsel for the appellant says :—" The learned judge in the Court below has misapprehended the preamble of the British North America Act when he says :—' It is true that the provinces have given executive power to the Dominion over subjects before belonging to them, but by the convention recited in this preamble they are to have a constitution similar to that of England regarding her colonies, with respect to the subjects retained, and, if so, the Lieutenant-Governors must have the Queen's prerogative still vested in them.' " Now, says the learned counsel :—" It is not the provinces, but the Dominion of Canada, which the preamble declares is to have a constitution similar in principle to that of the United Kingdom. The whole judgment of the Court below is placed on this fallacy." Without

Per Peters, J.

The preamble of the B.N.A. Act.

A constitution similar in principle to that of the United Kingdom.

[1] It is, however, contained in the Case in appeal to the Supreme Court of Canada, (Osgoode Hall library, vol. 41 of Cases in Appeal). The Supreme Court of the Island simply affirmed the decision of Peters, J., without argument, so as to expedite an appeal to the Supreme Court of Canada.

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now discussing further the point here raised, it may be observed that the words of the preamble of the British North America Act just referred to certainly do appear to relate to the constitution of the Dominion, and not of the provinces, yet the latter may also be said to have constitutions similar in principle to that of the United Kingdom, though the right is conferred upon them by section 92, No. 1, of amending their constitution save as to the office of Lieutenant-Governor.[1]

No. 1 of sect. 92, B.N.A. Act.

The Supreme Court of Canada.

The Supreme Court of Canada decided, at all events, that the prerogative right in question is not in the government of the provinces to the exclusion of the government of the Dominion; and the judgments affirm our leading proposition. Thus[2] Ritchie, C.J., says:—"The Queen's rights and prerogatives extend to the colonies in like manner as they do to the mother country;" and a little further on the same learned judge cites with approval the words of Bacon, V.C., in *In re* Bateman's Trust[3]:—"I cannot hesitate to say and to decide, that the Queen's prerogative is as extensive in New South Wales as it is here, in this county of Middlesex. It has been contended that the title of the Crown by forfeiture was confined to this soil,—the soil of England. But the Queen is as much the Queen of New South Wales as she is the Queen of England, and I must hold that every right which the Queen possessed by forfeiture extended as much to the colonies as to this country." And Strong, J., gives such a clear

Per Ritchie, C.J.

The Queen's prerogatives extend to the colonies.

[1] As to the position of provincial Lieutenant-Governors as representatives of the Queen, see Proposition 7, and the notes thereto. And as to this clause of No. 1, section 92, see, *infra*, p. 100, esp. note 2.

[2] 11 S.C.R. at p. 10, 4 Cart. at p. 399.

[3] L.R. 15 Eq. at p. 361.

statement of law covering the matter in question that the passage may well be cited here verbatim[1]:— Prop. 5-6

"That the law of England is the rule of decision in the province," (*sc.*, Prince Edward Island), "is not and cannot be disputed, nor has it been pretended . . . that by any express and direct legislation, provincial, federal, or imperial, the rights of the Crown, as applicable in Prince Edward Island, have been in any way interfered with. Authorities, which it would be useless to quote, so familiar are they, establish that in a British colony governed by English law, the Crown possesses the same prerogative rights as it has in England, in so far as they are not abridged or impaired by local legislation, and that, even in colonies not governed by English law, and which having been acquired to the Crown of Great Britain by cession or conquest, have been allowed to remain under the government of their original foreign laws, all prerogative rights of the Crown are in force, except such minor prerogatives as may conflict with the local law. The two decisions of the Court of Queen's Bench of the province of Quebec, in Monk *v.* Ouimet, 19 L.C.J. at p. 71, and Attorney-General *v.* Judah, 7 L.N. at p. 147, may perhaps be referred to this distinction.[2] Then, if the Crown's right of priority has been taken away in Prince Edward Island, it can, apart from the provisions of the Insolvent Act, only be by some of the provisions of the British North America Act. The most careful scrutiny of that statute will not,

So, also, per Strong, J.

So far as not abridged by local legislation.

Major and minor prerogatives.

[1] 11 S.C.R. at p. 17, *seq.*, 4 Cart. at p. 403, *seq.*

[2] In Dumphy *v.* Kehoe, 21 R.L. 119, (1891), Jetté, J., decided that the right of confiscation of the property of a felon condemned to death is one of those minor prerogatives of the Crown which must be regulated and governed by the peculiar and established law of the place, citing Chitty on the Law of the Prerogative, p. 25. See the notes to Propositions 8 and 9 as to legislative power in Canada over the royal prerogative, and as to major and minor prerogatives.

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however, lead to the discovery of a single word expressly interfering with those rights, and it is a well-settled axiom of statutory interpretation, that the rights of the Crown cannot be altered to its prejudice by implication, a point which will have to be considered a little more fully hereafter, but which it may be said, at present, affords a conclusive answer to any argument founded on the British North America Act. Putting aside this rule altogether, I deny, however, that there is anything in the Imperial legislation of 1867 warranting the least inference or argument that any rights which the Crown possessed at the date of Confederation, in any province becoming a member of the Dominion, were intended to be in the slightest degree affected by the statute; it is true, that the prerogative rights of the Crown were by the statute apportioned between the provinces and the Dominion, but this apportionment in no sense implies the extinguishment of any of them, and they therefore continue to subsist in their integrity, however their locality might be altered by the division of powers contained in the new constitutional law. It follows, therefore, that the Crown, speaking generally, still retains this right to payment in priority to other creditors of equal degree in Prince Edward Island. It is said, however, that whilst the last proposition may be true as regards the right of the Crown as representing the provincial government of the Island, it does not apply to the Crown as representing, as in the present case it does, the government of the Dominion. This objection is concluded by authority still more decisive than the former. That the Crown is at the head of the government of the Dominion, by which I mean that Her Majesty the Queen is, in her own royal person, the head of that government, and not her Viceroy the Governor-General, there

The B.N.A. Act does not affect prerogative right of priority.

Or any other rights of the Crown.

Though it apportions them between Dominion and provinces.

Altering in some cases their locality.

The Queen, not the Governor-General, is the head of the Dominion government.

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can be no doubt or question, for it is in so many words declared in the 9th section of the British North America Act, which enacts:—'The executive government and authority in and over Canada is hereby declared to continue and be vested in the Queen.' That for the purpose of entitling itself to the benefit of its prerogative rights, the Crown is to be considered as one and indivisible throughout the Empire, and is not to be considered as a quasi-corporate head of several distinct bodies politic (thus distinguishing the rights and privileges of the Crown as the head of the government of the United Kingdom from those of the Crown as head of the government of the Dominion, and, again, distinguishing it in its relations to the Dominion and to the several provinces of the Dominion), is a point so settled by authority as to be beyond controversy."[1]

Sect. 9 of the B.N.A. Act.

The Crown is one and indivisible throughout the Empire.

He then cites the Oriental Bank Corporation case[2] and *In re* Bateman's Trust,[3] in support of this, and says:—"It is, therefore, safe to conclude as a general proposition of law, that whenever a demand may properly be sued for in the name of the Queen, the prerogative rights of the Crown

[1]The same learned judge in Attorney-General of Canada *v.* Attorney-General of Ontario, frequently spoken of as the Pardoning Power case, (not yet reported in the Supreme Court, but reported below 20 O.R. 222, 19 O.A.R. 31), says of the prerogative of mercy:—"The authority to exercise this prerogative may be delegated to viceroys and colonial governors representing the Crown. Such delegation, whatever may be the conventional usage established on grounds of political expediency, a matter which has nothing to do with the legal question, cannot, however, in any way exclude the power and authority of the Crown to exercise the prerogative directly by pardoning an offence committed anywhere within the Queen's dominions . . . That the Crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them, seems to be a well-recognized constitutional canon."

[2]28 Ch. D. 64.

[3]L.R. 15 Eq. 355.

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attach in all portions of the British Empire subject to the prevalence of English law, irrespective of the locality in which the debt arose and of the government in right of which it accrued."

In re Bateman's Trust.

The case of *In re* Bateman's Trust,[1] referred to by the learned judge, certainly illustrates in a striking manner that the Crown is one and indivisible throughout the Empire. There the Crown claimed in England the goods and personal property found in England of a felon as for a forfeiture on a conviction for felony in the colony of New South Wales, and it was argued that the rights accruing to the Crown under such forfeiture were not enforceable in England. The Court (Bacon, V.C.), however, entirely rejected this contention, and determined that the rights of the Crown were not to be considered divisible according to the several governments and jurisdictions into which the Empire is apportioned, but that prerogative rights accruing to it in one jurisdiction may be enforced against persons and property anywhere throughout the Queen's dominions: per Strong, J., in The Queen *v.* Bank of Nova Scotia.[2]

Crown in England can claim forfeiture of goods of felon convicted in a colony.

Its rights are not divisible territorially.

But are one throughout the Empire.

And it does not seem possible, in the light of the above authorities, (to which he does not refer), to accept as accurate and satisfactory the dicta of

[1] L.R. 15 Eq. 355.

[2] 11 S.C.R. at pp. 20-21. In Maritime Bank *v.* The Queen, 17 S.C.R. at pp. 681-2, 4 Cart. at p. 421, (1889), Gwynne, J., says:— "Now, I do not at all question the authority of *In re* Bateman's Trust, or any like case, but I must say that, in my opinion, we make a very great mistake if we treat the Dominion of Canada, constituted as it is, as a mere colony. The aspirations of the founders of the scheme of Confederation will, I fear, prove to be a mere delusion if the constitution given to the Dominion has not elevated it to a condition much more exalted than, and different from, the condition of a colony, which is a term that, in my opinion, never should be used as designative of the Dominion of Canada."

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Per Fournier, J.

Fournier, J., in Attorney-General of British Columbia *v.* Attorney-General of Canada,[1] where he says:—"In our system of government Her Majesty as head of the Executive, whether federal or provincial, must be deemed to be present in each government, having in each the rights and prerogatives given her by the British North America Act. As chief of these different governments, she is not to be considered as present in her character as Queen of the British Empire, but only as Queen, and exercising only those rights and prerogatives to her assigned by the laws and constitution of each government. It is not true in fact to say that Her Majesty as chief of the federal Executive is the same legal personage as Her Majesty regarded as chief of the provincial Executive, for we cannot then distinguish the different, and not seldom, conflicting attributes which the constitution confers upon her. Certainly there is nothing anomalous, much less absurd, in saying that the Queen represented by the provincial Executive of British Columbia can treat or contract with the Queen represented by the federal Executive without its being possible for either of these governments either to lose or gain anything thereby. They will only be bound by the agreements entered into between them. The Queen represents them both within the limits of their respective powers, and in fact it is the two governments which contract together with her consent."

Seems to uphold a different view.

Objections to it.

In the first place, we may ask, with all respect, in what sense can the British North America Act be said to have given or assigned *(attribués)* rights and prerogatives to the Crown? Rather the Crown's rights and prerogatives would seem to have

[1] 14 S.C.R. at p. 363, 4 Cart. at p. 264, (1887).

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remained as before the Act, subject, as to some of them, to be dealt with by the Dominion parliament, and the provincial legislatures, legislating within the spheres of their respective jurisdictions as defined by the Act.[1] Then, again, if as stated by Strong, J., in the passage above cited from his judgment in the Queen *v.* The Bank of Nova Scotia, it is a point so settled by authority as to be beyond controversy that for the purpose of entitling itself to the benefit of its prerogative rights, the Crown is to be considered as one and indivisible throughout the Empire, it does not seem proper to say that in fact the Queen is not the same legal personage as chief of the federal executive, and as chief of the provincial executive power. And it is surely a novelty to speak of Her Majesty representing her different governments within the Empire, instead of her governments representing her.

B.N.A. Act neither gave rights to the Crown, nor took away rights from the Crown.

The Crown one and indivisible throughout the Empire.

Represented by the government of each locality.

And as in the above case of the Queen *v.* The Bank of Nova Scotia[2] the Queen in her government of Canada was held to have a prerogative right of priority of payment, so in The Provincial Government of New Brunswick *v.* The Liquidators of the Maritime Bank[3] it was decided by the Supreme Court of New Brunswick that Her Majesty in her provincial government was possessed of a similar prerogative right in respect of public moneys deposited in a bank by the provincial government; and the judges specially referred with approval to the dicta of Strong, J., in the Queen *v.* The Bank of Nova Scotia[4] above cited. And this New

Crown in right of the province has prerogative right of priority.

[1] See Propositions 7, 8, and 9, and the notes thereto.

[2] 11 S.C.R. 1, 4 Cart. 391.

[3] 27 N.B. 379, (1888).

[4] 11 S.C.R. 1, 4 Cart. 391, see pp. 78-81, *supra*.

Brunswick decision was afterwards affirmed by the Supreme Court of Canada,[1] and also by the Judicial Committee of the Privy Council.[2] Their lordships of the Privy Council say (at p. 441):— "The Supreme Court of Canada had previously ruled in the Queen *v.* The Bank of Nova Scotia, 11 S.C.R. 1, that the Crown, as a simple contract creditor for public moneys of the Dominion deposited with a provincial bank, is entitled to priority over other creditors of equal degree. The decision appears to their lordships to be in strict accordance with constitutional law. The property and revenues of the Dominion are vested in the Sovereign, subject to the disposal and appropriation of the legislature of Canada; and the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain. In The Exchange Bank of Canada *v.* The Queen, 11 App. Cas. 157, the Board disposed of the appeal on that footing, although their lordships reversed the judgment of the Court below, and negatived the preference claimed by the Dominion government, upon the ground that, by the law of the province of Quebec, the prerogative was limited to the case of a common debtor being an officer liable to account to the Crown for public moneys collected or held by him. The appellants did not impeach the authority of these cases, and they also conceded that, until the passing of the British North America Act, 1867, there was precisely the same relation between the Crown and the provinces which now subsists between the Crown and the Dominion.

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So held by the Privy Council.

Provincial Government of New Brunswick *v.* Liquidators of the Maritime Bank.

Crown's prerogatives as extensive in colonies as in Great Britain, subject to local law.

B.N.A. Act has not severed the connection between the Crown and the provinces.

[1] 20 S.C.R. 695, (1889).

[2] The Maritime Bank of Canada *v.* The Receiver-General of New Brunswick, [1892] A.C. 437.

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But they maintained that the effect of the statute has been to sever all connection between the Crown and the provinces; to make the government of the Dominion the only government of Her Majesty in North America; and to reduce the provinces to the rank of independent municipal institutions. For these propositions which contain the sum and substance of the arguments addressed to them in support of this appeal, their lordships have been unable to find either principle or authority. Their lordships do not think it necessary to examine in minute detail the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces."[1]

Or curtailed its rights and privileges.

In none of these cases was it necessary for the Court to deal with any questions as to the relative rights of the Dominion and provincial governments, should both be creditors of the same debtor with assets only sufficient to pay one. But in The Provincial Government of New Brunswick *v.* The Liquidators of the Maritime Bank, before the Supreme Court of New Brunswick,[2] counsel for the provincial government, when asked the question by Fraser, J.: —"Suppose the British government, Dominion government, and local government, all had a deposit in the bank, which would have the preference?" boldly replied:—"Neither. The Crown would be entitled to recover its entire claim; and if there was not enough to pay the whole, it would be apportioned among the different governments."

Where there is conflict between the Dominion Crown rights and provincial Crown rights, *quære.*

[1] See also Propositions 7 and 9, and the notes thereto.

[2] 27 N.B. at p. 385, (1888).

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Passing now to Proposition 6, it may be said to illustrate Proposition 5, by reference to the Crown's prerogative as the fountain of honour in Canada. Prop. 6.

Its words are from the judgment of Taschereau, J., in Lenoir *v.* Ritchie.[1] And he also observes in the same case[2] in like manner:—"I need hardly add that the Sovereign has this prerogative of conferring honours and dignities over the whole British Empire, and that, by the British North America Act, the Crown has not renounced or abdicated this prerogative over the Dominion of Canada, or any part thereof." And so Sir John Macdonald, as Minister of Justice, reported to the Governor-General on January 3rd, 1872,[3] as to the question which had been raised by the government of Nova Scotia as to their power to appoint Queen's Counsel, that "as a matter of course Her Majesty has directly, as well as through her representative, the Governor-General, the power of selecting from the Bars of the several provinces her own Counsel, and as *fons honoris* of giving them such precedence and pre-audience in her Courts as she thinks proper." And while he there expresses the view that under No. 14 of section 92, relating to the administration of justice, including the constitution, maintenance, and organization of provincial Courts, the provincial legislature may make such provisions with respect to the Bar, the management of criminal prosecutions by counsel, the selection of those counsel, and the right of pre-audience as it sees fit, he adds:—"Such enactment must, however, in the

Crown as the fountain of honour in Canada.

Per Taschereau, J.

Sir John Macdonald.

As to right to appoint Queen's Counsel.

No. 14 of sect. 92, B.N.A. Act.

The Royal prerogative paramount over provincial legislative power.

[1] 3 S.C.R. at pp. 628-9, 1 Cart. at p. 535, (1879).

[2] 3 S.C.R. at p. 619, 1 Cart. at p. 525.

[3] Hodgins' Provincial Legislation, Vol. 1, pp. 26-7; see, also, *ibid.*, Vol. 2, at pp. 25, 56, 57.

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opinion of the undersigned, be subject to the exercise of the royal prerogative, which is paramount, and in no way diminished by the terms of the Act of Confederation."

Sed quære.

But as to this, as pointed out in the notes to Propositions 8 and 9, there would seem to be a correlation of executive and legislative power under the British North America Act even where such executive power is of a prerogative character, and, therefore, it would appear that either under No. 4 or No. 14 of section 92, or both, provincial legislatures must have the power to regulate the exercise of the prerogative of appointing Queen's Counsel so far as provincial Courts are concerned. And in an opinion dated December 9th, 1887,[1] Sir Horace Davey and Mr. Haldane, to whom the matter had been submitted on behalf of the Ontario government, arrived at the conclusion that the appointment of Queen's Counsel is not a mere dignity or honour, but is the appointment to an office, and that therefore a provincial legislature has power to authorize the Lieutenant-Governor to make appointments of Queen's Counsel for the purposes of the provincial Courts, relying mainly on No. 4 of section 92, whereby provincial legislatures may make laws in relation to the appointment of provincial officers.[2]

Correlation of executive and legislative power.

Sir Horace Davey's opinion on Queen's Counsel question.

Appointment of Queen's Counsel is an appointment to an office.

No. 4 of sect. 92, B.N.A. Act.

[1] Ont. Sess. Papers, 1888, No. 37.

[2] Those who desire to pursue the subject of the power to appoint Queen's Counsel may be referred, besides the above case of Lenoir *v.* Ritchie, 3 S.C.R. 575, 1 Cart. 488, (1879), to an interesting opinion of the Attorney-General of South Australia, published in the *Canadian Law Times*, vol. 12, p. 259, *seq.;* and also to some articles in that periodical, vol. 10, at pp. 23, 25, and 58, and vol. 13, p. 1; to Mr. Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 330, where he refers to a despatch from Sir J. S. Pakington, in 1852, to the Governor of Nova Scotia, in relation to the appointment of Queen's Counsel; also

Authorities on question of appointment of Queen's Counsel.

Prop. 5-6

Mr. Clement, in his work on the Law of the Canadian Constitution, observes (p. 143) that:— "The prerogatives vested in the Crown as the fountain of honour are looked upon as (so to speak) prerogatives at large, and not connected with any particular department of executive government;" and (at p. 318) that these prerogatives (*sc.*, those vested in the Crown as the fountain of honour) are treated as "prerogatives pertaining to matters of imperial concern." He does not, however, give his authorities for this.

Mr. Clement on the prerogative of honour.

Prerogatives at large.

At all events, it is submitted, the Governor-General cannot exercise the prerogative of the Crown as *fons honoris* except so far as it may have been delegated to him by his commission or instructions; and it must further be noted that, as pointed out in connection with Proposition 7, in the recent case of The Maritime Bank of Canada *v.* The Receiver-General of New Brunswick,[1] the Judicial Committee has decided that a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty, for all purposes of provincial government, as the Governor-General himself is for all purposes of Dominion government.[2]

Governor-General represents Crown no further than as delegated to him.

ibid., at p. 333, *seq.*; and to 9 C.L.J.N.S. 178, *seq.*, where correspondence between the Dominion and Ontario governments is given. Also to Ont. Sess. Pap., 1888, No. 37; and Can. Sess. Pap., 1873, No. 50.

[1] [1892] A.C. 437.

[2] On the whole subject of imperial dominion exercisible over self-governing colonies by the grant of honours and titular distinctions, see Todd's Parl. Gov. in Brit. Col., 2nd ed., chap. 10, p. 313, *seq.*

PROPOSITION 7.

7. The Lieutenant-Governors of provinces, when appointed, are as much the representatives of Her Majesty for all purposes of Provincial government, as the Governor-General himself is for all purposes of Dominion government.

The Governor-General.

As regards the Governor-General, it is only necessary to mention one or two cases in which his position as the representative of the Queen has been specially referred to in connection with the question of the constitutional validity of statutes.

Reserved provincial Act.

In *Ex parte* Williamson,[1] the Supreme Court of New Brunswick held that the Act of the local legislature, 32 Vict., chap. 92, relating to the appointment of justices of the peace in the province was *intra vires* upon the ground thus stated by Allen, C.J., in delivering the judgment of the Court:—"The Act 32 Vict., chap. 92, was apparently passed with a suspending clause, or reserved for the consideration of the Governor-General under the 90th section of the British North America Act. It received the Governor-General's assent on August 20th, 1869, and was proclaimed to be in force here on September 22nd, following. It may therefore be said that Her Majesty, through her representative, has expressly recognized the right of the local government to appoint justices of the peace. See per Ritchie, C.J., in Valin *v.* Langlois,

Appointment of justices of the peace.

[1] 24 N.B. at p. 64, (1884).

3 S.C.R. at p. 34. We therefore think the power of the local government to make such appointments has not been open to question."[1] Prop. 7

The passage from the judgment of Ritchie, C.J., in Valin *v.* Langlois[2] here referred to relates to the assent given to Dominion Acts, and is that in which, speaking of the Dominion Controverted Elections Act, 1874, 37 Vict., chap. 10, which confers upon the provincial Courts jurisdiction with respect to elections to the Dominion House of Commons, he says:—"It is said that if this," (*sc.*, the Court thus appointed for the trial of election petitions), "is a Court distinct from the Courts of which the judges are primarily members, the judges have never been appointed thereto by the Crown, nor sworn as judges thereof, and therefore they are not judges of this new tribunal if, as such, it exists. But, in my humble opinion, there is no force in this objection. The judges require no new appointment from the Crown, they are statutory judges in controverted election matters by virtue of an express enactment by competent legislative authority. The statute makes the judges for the time being of the provincial Courts judges of these peculiar and special Courts. The Crown has assented to that statute, and therefore they are judges by virtue of the law of the Dominion, and with the royal sanction and approval."

Governor-General's assent to Dominion Controverted Elections Act.

Was the assent of the Crown

To the appointment of election judges thereby made?

In like manner, the judges of the Supreme Court in Nova Scotia, in the Great Seal Case, in 1877, pointed out that Her Majesty, in assenting (through The Great Seal Case.

[1] On the general subject of the appointment of justices of the peace, see the notes to Propositions 8 and 9.

[2] 3 S.C.R. at p. 34, 1 Cart. at p. 187, (1879). Referred to also in the recent British Columbia case of Piel-ke-ark-an *v.* Reg., 2 B.C. (Hunter) at pp. 68, 70, (1891).

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the Governor-General) to certain provincial Acts, authorizing "her Lieutenant-Governor" to exercise her prerogative right in the use of the Great Seal in and for the province,—"to the extent in which it is necessarily conferred on that high officer by the statute,"—did expressly delegate to and empower Lieutenant-Governors to exercise certain prerogative rights appropriate to the office of the representative of the Sovereign in the particular province.[1]

The Lieutenant-Governors of provinces

It is, however, mainly as regards the Lieutenant-Governors of the various provinces that the leading Proposition calls for comment. It is derived from the judgment of the Privy Council in The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick,[2] a judgment which as Boyd, C., observes, in *Re* McDowell and the Town of Palmerston,[3] "set at rest many moot points, particularly as to the status of the Lieutenant-Governor, declaring him to be the representative of Her Majesty for all purposes of provincial government," which had been the subject, as will shortly be seen, of very various opinions.

Are Her Majesty's representatives.

[1] Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 596, citing Can. Sess. Pap., 1877, No. 86, p. 36, where the judgments of the Nova Scotia judges are printed. And see *infra* p. 114, n. 1.

[2] [1892] A.C. 437. In this case, at p. 441, their lordships, as cited in the notes to Propositions 5 and 6 (*supra* p. 86), point out that the provisions of the British North America Act "nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces."

[3] 22 O.R. at p. 565, (1892). For a discussion of the position of governors of colonies in relation to the Sovereign, see the opinion of the Attorney-General of South Australia, 12 C.L.T., p. 259, *seq.* And on the whole subject of the constitutional position of colonial governors, see Todd's Parl. Gov. in Brit. Col., 2nd ed., *passim*, esp. at p. 34, *seq.* Reference may also be made to the article on "The Prerogative of the Crown in Colonial Legislation," by Mr. Thomas Hodgins, Q.C., in Rose-Belford's *Canadian Monthly*, Vol. 5, p. 385, also referred to *supra* p. 72.

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In holding as they did in this case, the Privy Council were quite consistent with their dictum in Théberge *v.* Laudry,[1] where Lord Cairns, delivering the judgment of their lordships, speaks of the Quebec Controverted Elections Act of 1875 as "an Act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party;"[2] which is cited by Burton, J.A., in Reg. *v.* St. Catharines Milling and Lumber Co.[3] as direct confirmation of the view that Lieutenant-Governors do possess the power to act in the name of the Queen. In their judgment in The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick, above cited, the Privy Council observe[4]:—"It would require very strong language, such as is not to be found in the Act of 1867, to warrant the inference that the imperial legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share . . . If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the Governor-General and not the Queen, whose viceroy he is, became the sovereign authority of the province whenever the Act of 1867 came into operation. But the argument ignores the fact that, by section 58, the appointment of a provincial Governor is made by the 'Governor-

The Privy Council.

Théberge v. Laudry.

Liquidators of Maritime Bank v. Receiver-General of New Brunswick.

[1] 2 App. Cas. 102, 2 Cart. 1, (1876).

[2] 2 App. Cas. at p. 108, 2 Cart. at p. 9; see also Clarke *v.* Union Fire Ins. Co., 10 O.P.R. at p. 316, 3 Cart. at p. 338, (1883).

[3] 13 O.A.R. at p. 166, 4 Cart. at p. 207, (1886).

[4] [1892] A.C. at p. 443.

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General by instrument under the Great Seal of Canada,' or, in other words, by the executive government of the Dominion, which is by section 9 expressly declared 'to continue and be vested in the Queen.' There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body, who have no powers and no functions except as representatives of the Crown. The act of the Governor-General and his Council in making the appointment is within the meaning of the statute the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government."[1] And accordingly they held in this case that whereas in the liquidation of the Maritime Bank of Canada, carrying on business in the City of St. John, New Brunswick, the provincial government was a simple contract creditor for a sum of public moneys of the province deposited in the name of the Receiver-General, the claim was for a Crown debt to which the prerogative attached, and the provincial government was entitled to payment in full over other depositors and creditors; in which decision they were affirming the decision of the Supreme Court of Canada,[2] which in its turn

Sect. 9 of B.N.A. Act.

The executive government of and over Canada continues vested in the Queen.

Provincial government can claim Crown's prerogative of priority as creditor.

[1] Thus Lord Carnarvon would seem to have erred in the view he took in his despatch to Lord Dufferin of January 7th, 1875, cited by Taschereau, J., in Mercer *v.* Attorney-General of Ontario, 5 S.C.R. at p. 671, 3 Cart. at p. 54, (from Can. Sess. Pap., 1875, Vol. 8, No. 7), where he says of Lieutenant-Governors:—"They do not hold commissions from the Crown, and neither in power nor privilege resemble those Governors, or even Lieutenant-Governors of colonies, to whom, after special consideration of their personal fitness, the Queen, under the Great Seal and her own hand and signet, delegates portions of her prerogatives and issues her own instructions."

[2] 20 S.C.R. at p. 695, (1888).

affirmed the decision of the Supreme Court of New Brunswick.[1] Prop. 7

In thus holding that the Lieutenant-Governors of provinces for the purposes of provincial government were as much representatives of the Queen as the Governor-General himself for purposes of Dominion government, the Privy Council were only stating in a convenient general form the conclusion to which the dicta of many judges in former cases had pointed,[2] and a brief consideration of these dicta will conduce to a fuller understanding of the manner in which provincial Lieutenant-Governors represent the Queen.

Lieutenant-Governors represent the Queen for purposes of provincial government.

For example, in the opening words of the above passage from the judgment of the Judicial Committee in The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick, we are reminded of the words of Papineau, J., in Molson *v.* Chapleau,[3] where he says:—"It has been properly said that the Queen cannot surrender any of her prerogatives, except by a law and in express terms. In like manner, and more properly, it may be said that the Queen cannot cease to be the personification of the sovereign

Per Papineau, J.

The Queen personifies the sovereign authority throughout the Empire.

[1] 27 N.B. at p. 379.

[2] The point had been argued out at great length by Mr. Justice Loranger in his "Letters upon the Interpretation of the Federal Constitution," (first letter), Quebec, 1884, who, amongst other things, at p. 24, points out that by section 59 of the Union Act, 1840, Imp. 3-4 Vict., c. 35, it was enacted that "all powers and authorities expressed in this Act to be given to the governor of the province of Canada shall be exercised by such governor in conformity with and subject to such orders, instructions, and directions as Her Majesty shall from time to time see fit to make or issue," and adds that this is "a provision which is not repealed by the Confederation Act, but is still in force under section 65 of the British North America Act." *Sed quære.*

[3] 6 L.N. at p. 224, 3 Cart. at pp. 365-6, (1883); referred to by Jette, J., in Lambe *v.* The North British and Mercantile Fire and Life Ins. Co., M.L.R. 1 S. C. at p. 34, 4 Cart. at pp. 91-2.

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authority in any part of the Empire without a law of the imperial parliament, or an agreement in express terms to that effect. For from the moment when it is no longer she who personifies the sovereign authority in every province of the Empire, that province is no longer an integral part of that Empire. Now, if the Queen has withdrawn, by the federal compact, both from the legislature and the executive of the provinces, and if the Lieutenant-Governors are not her representatives, and do not exercise in her name and in her stead the authority which they exercise, these provinces are no longer integral parts of the Empire. The powers granted to the provincial legislatures are granted to them to the exclusion of the federal parliament. It is the same with the executive power. A certain number of these powers are rights of sovereignty, which can only be exercised by the Sovereign or by her representatives in her name. Such are legislation over property and civil rights, the administration of justice, the constitution of the Courts, as well civil as criminal, etc. Either the Lieutenant-Governors and legislators act in their own name (then they are independent of Her Majesty), or they do so in the name of Her Majesty, and then they are her representatives. If it is right to say that Her Majesty in person does not form part of the provincial legislatures and provincial governments, it is equally right to say that she forms part of them by representation. For she cannot cease to form part of them, personally or by representation, without ceasing to be Sovereign of those provinces. The representative of the Sovereign cannot be brought before the Courts any more than she herself can, except when and as she allows. It is not by inadvertence that the law directs the Lieutenant-Governor to choose the

Otherwise the link of union would be gone.

Provincial legislatures and governments exercise sovereign powers.

The Queen forms part of them by representation.

Otherwise she would not be Sovereign of the provinces.

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legislative councillors and to summon the Assemblies in the name of Her Majesty. This is in accordance with the very nature of the English constitution, of which ours are only copies." And, accordingly, he held in that case that the members of the Executive Council of a province under the British North America Act represent the Sovereign, and cannot be sued in the civil Courts of the province for acts performed by them in the discharge of their official duties, a decision which we may observe is entirely in accordance with the prior one of Taschereau, J., in Church *v.* Middlemiss,[1] in which he held that the members of the Executive Council who concur in an order of Council sanctioning the sale by the Crown of certain real property, and the execution of a deed of sale in accordance with such order, cannot be sued *en garantie* by the purchaser, to guarantee and indemnify him against an action brought by the Attorney-General for and on behalf of Her Majesty to set aside the deed of sale on the ground (*inter alia*) that the sale itself was *ultra vires* and that the deed was executed without lawful authority. At page 321, he speaks of it as among the most elementary principles of the constitution, and as trite to say that the acts of the executive power are "the acts of the Sovereign done upon the advice of the Sovereign's ministers. In this case the plaintiff virtually sues the defendant Ouimet upon the ground that Ouimet, being one of the Crown's advisers, erroneously advised Her Majesty."

Hence provincial Executive Council not suable in civil Courts in respect to performance of official duties.

Per Taschereau, J.

Sale of Crown lands.

So to refer again to the judgment of Burton, J.A., in Reg. *v.* St. Catharines Milling and Lumber Co.,[2]

Per Burton, J.A.

[1] 21 L.C.J. at p. 319, (1877).

[2] 13 O.A.R. at pp. 165-6, 4 Cart. at p. 207, (1886).

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the learned judge observes:—"If it had not been for the expression to be found in some judicial utterances placing within very narrow limits the powers of the Executive of the provinces, I should have thought it too clear for argument, that the powers formerly exercised by Lieutenant-Governors of the other provinces, and by the Governor-General of Canada in reference to provincial matters, including agreements, so-called treaties, with the Indians for the extinguishment of their rights,[1] and granting to them in lieu thereof certain reserves either for occupation or for sale, were now vested exclusively in the Lieutenant-Governors. The view that has been sometimes expressed that they do not represent Her Majesty for any purpose appears to me to be founded on a fallacy, and to be taking altogether too narrow a view of an Act, which is not to be construed like an ordinary Act of parliament, but as pointed out in The Queen *v.* Hodge, 9 App. Cas. 117, is to be interpreted in a broad, liberal, and quasi-political sense[2] . . . There are several clauses of the British North America Act in which his power to act in the name of the Queen is expressly recognized, as, for instance, section 82, which empowers him in the Queen's name to summon the legislature. In section 72 the Lieutenant-Governor of Quebec is authorized to appoint legislative councillors in the Queen's name, and the provincial legislatures create Her Majesty's Courts of civil and criminal jurisdiction, the writs in which are issued in Her Majesty's name. And this view appears to have received the direct confirmation of the Privy Council in Théberge *v.* Laudry."[3]

Lieutenant-Governors represent Her Majesty for some purposes.

Several sections of the B.N.A. Act recognize their right to act for the Queen.

[1] As to this see 12 C.L.T. at p. 163, and the notes to Proposition 53.

[2] See *supra* p. 33, *seq.*

[3] 2 App. Cas. at p. 108, 2 Cart. at p. 9, (1876).

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The Mercer escheat case.

So again in Mercer *v.* Attorney-General for Ontario,[1] in which case it was urged that Lieutenant-Governors in no sense represented the Crown, and that therefore all seigniorial or prerogative rights, or rights enforceable as seigniorial or prerogative rights, such as escheats, of necessity belonged to the Dominion, Ritchie, C.J., observes:—"To say that the Lieutenant-Governors, because appointed by the Governor-General, do not in any sense represent the Queen in the government of their provinces is, in my opinion, a fallacy; they represent the Queen as Lieutenant-Governors did before Confederation, in the performance of all executive or administrative acts now left to be performed by Lieutenant-Governors in the provinces in the name of the Queen; and this is notably made apparent in section 82, which enacts that 'the Lieutenant-Governor of Ontario and of Quebec shall from time to time, in the Queen's name, by instrument under the Great Seal of the province, summon and call together the legislative assembly of the province'; and with reference to which matter nothing is said in respect to Nova Scotia and New Brunswick, the reason for which is obvious, the executive authority at Confederation continuing to exist, the Lieutenant-Governors of those provinces were clothed with authority to represent the Queen, and in her name call together the legislatures; and also in the section retaining the use of the Great Seals,[2] for the Great Seal is never attached to a document except to authenticate an act in the Queen's name, such as proclamations summoning the legislatures, commissions appointing the high executive officers of the

Per Ritchie, C.J.

Lieutenant-Governors represent the Queen.

Notably in calling together the legislatures,

And in the use of the Great Seal.

[1] 5 S.C.R. at p. 637, 3 Cart. at p. 28-9, (1881).

[2] Section 136.

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province, grants of the public lands, which grants are always issued in the name of the Queen under the provincial Great Seals."[1]

No. 1 of sect. 92, B.N.A. Act.

And a little later on he refers to section 92, No. 1, whereby provincial legislatures are empowered exclusively to make laws in relation to "the amendment from time to time, notwithstanding anything in this Act, of the constitution of the province, except as regards the office of Lieutenant-Governor," from which, he says, he thinks a fair inference may be drawn that, as the Lieutenant-Governor, under certain circumstances and in certain matters having reference to provincial administration, represents the Crown, the provincial legislatures are not permitted to interfere with this office.[2]

[1] See per Ritchie, C.J., S.C., 5 S.C.R. at pp. 634-5, 3 Cart. at pp. 25-6.

[2] See, also, per Ritchie, C.J., S.C., 5 S.C.R., at pp. 643-4, 3 Cart. at p. 33. In a report of Sir John Thompson, as Minister of Justice, dated July 16th, 1887, upon the Quebec Act of 1886, respecting the executive power, 49-50 Vict., c. 96, which declared the Lieutenant-Governor, or person administering the government of the province, to be a corporation sole, he says :—"The office of Lieutenant-Governor is one of the incidents of the constitution, and the authority to legislate in respect thereof is excepted from the powers conferred upon the legislatures of the provinces, and is exclusively vested in the parliament of Canada. In the opinion of the undersigned, it is immaterial whether a legislature by an Act seeks to add to or take from the rights, powers, or authorities which, by virtue of his office, a Lieutenant-Governor exercises, in either case it is legislation respecting his office;" and he recommended that the Act should be disallowed, and it was disallowed accordingly: Hodg. Prov. Legisl., Vol. II., pp. 58-9. However, in Attorney-General of Canada *v.* Attorney-General of Ontario, 20 O.R. 222, (1890), at p. 247, Boyd, C., speaking of No. 1 of section 92, "which forbids interference with the office of Lieutenant-Governor," says :—"That veto is manifestly intended to keep intact the headship of the provincial government, forming, as it does, the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office." And so in his published argument before the Court of Appeal in this case, elsewhere referred to, Mr. Edward Blake says of this clause of the Act :—"This means that those elements of the constitution which can be properly deemed to be parts of the constitution relating to the office of the Lieutenant-Governors are not to be changed; and for an obvious reason, because the Lieutenant-Governor is the link between the federal and the provincial, aye, and between

No. 1 of sect. 92, B.N.A. Act.

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And reference may also be made to the despatch of Lord Kimberley, Secretary of State for the Colonies, dated November 7th, 1872,[1] (referred to per Taschereau, J., in this same case of Mercer *v.* Attorney-General for Ontario),[2] where he says :— "And with reference to the question asked by Sir Hastings Doyle, and submitted by Lord Lisgar for my decision, namely, 'Whether the Lieutenant-Governors are supposed to be acting on behalf of the Queen,' I have to observe that, while from the nature of their appointment they represent on ordinary occasions the Dominion government, there are nevertheless occasions (such as the opening or closing of a session of the provincial legislature, the celebration of Her Majesty's birthday, the holding of a levee, etc.) on which they should be deemed to be acting directly on behalf of Her Majesty, and the first part of the National Anthem should be played

Lord Kimberley.

the Imperial and the provincial authority; he is the means of communication, he is the chain and conduit of Imperial as well as federal connection ; and, therefore, his office in the constitution, his constitutional position as a federal officer, is not to be affected." And the Ontario Court of Appeal (19 O.A.R. 31) and the majority of the Supreme Court of Canada (23 S.C.R. 458) affirmed him in holding the Ontario Act there in question *intra vires*, though it purported to vest certain powers, authorities, and functions in the Lieutenant-Governor of Ontario. In the latter Court, however, Gwynne, J., says :— "So to extend the powers, authorities, and functions of the Lieutenant-Governor of Ontario beyond those expressly vested in him by the Constitutional Act is, in my opinion, a violation of the terms of No. 1 of section 92 of that Act . . . An Act which purports to vest in a Lieutenant-Governor of the province the royal prerogative in excess of so much thereof as is expressly or by necessary implication vested in him by the British North America Act must, I think, be held to be an alteration of the constitution of the province as regards the office of Lieutenant-Governor." The other Judges of the Supreme Court do not specially refer to this clause, Strong, C.J., and Fournier, J., resting their decision in favour of the Act upon its precautionary phrases—"So far as this legislature has power to enact," etc.—referred to in the notes to Proposition 32, *infra*, while Taschereau, J., simply refers to the case of The Liquidators of the Maritime of Canada *v.* The Receiver-General of New Brunswick, [1892] A.C. 437. See this case further referred to *infra* pp. 113, *seq.*

Amendment of provincial constitution as regards office of Lieutenant-Governor.

[1] Ont. Sess. Pap., 1873, No. 67

[2] 5 S.C.R. at p. 672, 3 Cart. at p. 55, (1883).

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in their presence," as to which, however, it may now seem to be a question how far Lieutenant-Governors can be properly spoken of as representing the Dominion government.[1]

And it may be regarded as quite consistent with the view of the position of the Lieutenant-Governor expressed in the leading proposition, and with the principle that the Crown is one and indivisible throughout the Empire,[2] that in Attorney-General of Ontario *v.* The Niagara Falls International Bridge Co.[3] it was held by Spragge, V.C., that the provincial Attorney-General is the officer of the Crown who must be considered to be present in the Courts of the province to assert the rights of the Crown and those who are under its protection, even in respect of the violation of rights created by an Act of the parliament of the Dominion. And so it is pointed out that it has never been doubted that the Attorney-General of the province is the proper officer to enforce those laws by prosecution in the Queen's Courts of the provinces.[4]

So provincial Attorney-General represents the Crown in provincial Courts.

Liquidators of Maritime Bank *v.* Receiver-General of New Brunswick before Court of first instance.

In the able argument, admirably reported, in the same case from which the leading proposition is

[1] And for another case in which the view that Lieutenant-Governors do represent Her Majesty was upheld, see per Tessier, J., in Attorney-General of Quebec v. Attorney-General of the Dominion, 2 Q.L.R. at p. 242, 3 Cart. at p. 105.

[2] See *supra* pp. 81-2.

[3] 20 Gr. 34, 1 Cart. 813, (1873).

[4] Thus in Monk *v.* Ouimet, 19 L.C.J. 71, (1874), the Attorney-General of Quebec claimed a sum of money which it was objected did not belong to the province of Quebec, but to the Dominion government, but Dorion, C.J., disposed of the contention by saying :—"Admitting that this debt belongs to the Dominion, it cannot be denied that it must be claimed by and in the name of Her Majesty, and that the Attorney-General has the right to appear for Her Majesty in all the Courts of justice in this province. The question as to which government this sum belongs to does not arise here." So, also, per Taschereau, J., S.C. at p. 83.

taken before the Court of first instance,[1] counsel for the Crown, arguing that Lieutenant-Governors do represent Her Majesty in respect to local provincial matters, observe :—"By taking the view we have presented, the whole scheme of union is made consistent and harmonious. The Sovereign is not only the chief, but the sole magistrate of the nation, and all others act through her. The executive authority is represented by the federal and provincial governments, reaching out in both directions, and covers the whole ground. In case it should be argued that because the Lieutenant-Governor is appointed by the Governor-General he cannot be supposed to represent Her Majesty, it may be well to refer to the old plantations before the Revolution. The proprietors could select the governors, subject to the approval of the Crown. They were held to represent the Crown: Chitty on the Prerogative, pp. 25, 26, 31, 32, 33. The Governor-General is the Queen's representative, and in appointing the Lieutenant-Governor he does it on behalf of Her Majesty."[2] And in his judgment in that case, Fraser, J.,[3] expresses the matter in very much the same words as the Privy Council in our leading proposition, saying that it would seem to him that:—"While the Dominion Executive act for the Crown in federal matters, the provincial Executive act for

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Argument of counsel.

Under the British system Sovereign is the chief and, in a sense, the sole magistrate.

Lieutenant-Governors none the less represent the Queen because appointed by the Governor-General.

Per Fraser, J.

[1] *Sub nom.* The Provincial Government of the Province of New Brunswick *v.* The Liquidators of the Maritime Bank, 27 N.B. 379, (1888). It is also observed in this argument that the oaths of office of Governor-Generals and Lieutenant-Governors are precisely alike. They are given in Dom. Sess. Pap., 1884, Vol. 17, No. 77. The commissions of several of the Lieutenant-Governors of Quebec, it may be noted, are also set out, *ib.*, No. 77, *b.*

[2] As to which, see The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick, [1892] A.C. at p. 443, *supra* pp. 93-4.

[3] 27 N.B. at p. 396.

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the Crown in matters of provincial concern;" and he adds, at p. 400:—"In regard to the powers of the Executive, great and extensive changes were made," (*sc.*, by the British North America Act), "but in the changes that were made I cannot see anything in the British North America Act which takes away or abridges the executive authority (by which I mean the provincial executive authority) in respect of all subjects and matters which by the Act are declared to be provincial, and which are left to be dealt with by the provincial Executive and provincial legislatures."[1]

Provincial executive authority over provincial matters unabridged by B.N.A. Act

Dicta denying that Lieutenant-Governors represent Her Majesty.

On the other hand, there have been dicta of many judges to the effect that Lieutenant-Governors are not representatives of Her Majesty, and the matter was much discussed in Lenoir *v.* Ritchie,[2] where the contention affirmed by the judges of the Supreme Court of Nova Scotia, that, the assent of the Crown having been given to Acts of that province authorizing the Lieutenant-Governor to appoint Queen's Counsel and grant patents of precedence to members of the provincial Bar, this must be taken as a legislative declaration of the waiver and transference of the "Sovereign's functions, and that consequently all objections taken to the Acts on the ground that they were an unauthorized interference with the prerogative belonging to the Crown of regulating precedence at the Bar were unfounded," was not

Lenoir v. Ritchie.

[1] It is almost needless to observe that neither in this case nor in any other is it suggested that the British North America Act intended the position of the Lieutenant-Governors in any province to be different from that of those in the others, and Fraser, J., in this case (27 N.B. at p. 400), expressly repudiates any such notion. See also Proposition 52.

[2] 3 S.C.R. 575, 1 Cart. 488, (1879). The judgments of the judges of the Supreme Court of Nova Scotia in this case are printed in Can. Sess. Pap., 1877, No. 86, including the portion thereof dealing with the question raised as between the new and old Great Seal of the province, which Mr. Cartwright has omitted.

upheld by the judges of the Supreme Court of Canada.[1] Prop. 7

But with reference to our immediate subject, we may observe that in this case of Lenoir *v.* Ritchie Taschereau, J., says[2] :—"It seems to me that the theory that the Queen is bound by certain statutes because she is a party thereto can have no application whatever to the provincial statutes. In the federal parliament, the laws are enacted by the Queen, by and with the advice and consent of the Senate and the House of Commons. Not so in the provinces. Their laws are enacted by the Lieutenant-Governors and the legislatures. The Governor-General is appointed under the Royal Sign Manual and Signet; the Lieutenant-Governors are not even named by the Governor-General, but by the Governor-General in Council. They are officers of the Dominion government." Per Taschereau, J. Lieutenant-Governors are officers of the Dominion government. But see *supra* pp. 101-2.

And, again, in this case,[3] Henry, J., says :—"The Queen has not signified her assent to the local Act in question. By the provisions of section 90 of the Imperial Act, the Governor-General, and not the Queen, assents to local Acts made in his name, as provided. The Lieutenant-Governors are appointed, not by the Queen, but by the Governor-General in Council. It cannot, therefore, be successfully contended that the Queen has assented to the local Act in question." And, again, Gwynne, J., says[4] :—"The Dominion of Canada is constituted a quasi-Imperial power, in which Her Majesty retains all her executive and legislative authority in all matters Per Henry, J. Per Gwynne, J.

[1] See the notes to Propositions 8 and 9, *infra* pp. 177-9.

[2] 3 S.C.R. at p. 623, 1 Cart. at p. 529.

[3] 3 S.C.R. at p. 613, 1 Cart. at p. 519.

[4] 3 S.C.R. at p. 634, 1 Cart. at pp. 540-1.

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not placed under the executive control of the provincial authorities in the same manner as she does in the British Isles; while the provincial governments are, as it were, carved out of, and subordinated to, the Dominion. The head of their executive government is not an officer appointed by Her Majesty or holding any commission from her, or in any manner personally representing her, but an officer of the Dominion government, appointed by the Governor-General acting under the advice of a council, which the Act constitutes the Privy Council of the Dominion. The Queen forms no part of the provincial legislatures, as she does of the Dominion parliament."[1]

Lieutenant-Governors are officers of the Dominion government. But see *supra* pp. 101-2.

The Privy Council.

But with these words of Gwynne, J., we may contrast the passage from the judgment of the Privy Council in the case from which our leading propo-

[1]For other references and dicta expressive of the view that Lieutenant-Governors are not Her Majesty's representatives, or, at all events, not her direct representatives, see per Gwynne, J., in Lenoir *v.* Ritchie, 3 S.C.R. at pp. 637-9, 1 Cart. at. pp. 543-5; per Gwynne, J., in Mercer *v.* Attorney-General for Ontario, 5 S.C.R. at p. 711, 3 Cart. at pp. 83-4; per O'Connor, J., in Gibson *v.* McDonald, 7 O.R. at pp. 420-1, 3 Cart. at pp. 329-30, (1885); per Harrison, C.J., in Regina *v.* Amer., 42 U.C.R. at pp. 407-8, 1 Cart. at p. 740, (1878), as to which case see Todd's Parl. Gov. in Brit. Col., 2nd ed., at pp. 596-7; per Taschereau, J., in Mercer *v.* Attorney-General for Ontario, 5 S.C.R. at p. 671, 3 Cart. at p. 54, (1881); per Taschereau, J., in Attorney-General of Quebec *v.* Attorney-General of the Dominion, *sub nom.*, Church *v.* Blake, 1 Q.L.R. at pp. 180-2, 3 Cart. at p. 114, where he says:—"Under our constitution, the sovereignty is at Ottawa. It is only there that Her Majesty is directly represented"; per Taschereau, J., in Queen *v.* Bank of Nova Scotia, 11 S.C.R. at p. 24, 4 Cart. at p. 408, (1885), where he declares that Lieutenant-Governors "in the performance of certain of their duties as such under the British North America Act may be said to represent Her Majesty, in the same sense and as fully, perhaps, as Her Majesty is represented, for instance, by justices of the peace, constables, and bailiffs, in the execution of their duties"; per Ramsay, J., in *Ex parte* Dansereau, Cotte's case, 19 L.C.J. at p. 215, 2 Cart. at p. 224, where he declares that the Queen forms no part of the provincial legislatures, and that she could not in her own person sanction a Bill of the local legislature, though she names the officer who shall perform this duty; per Ramsay, J., in Attorney-General *v.* Reed, 3 Cart. at p. 219; per Taschereau, J., in Lenoir *v.* Ritchie, 3 S.C.R. at p. 622, 1 Cart. at p. 528, (1879).

sition is taken, The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick,[1] where they say: — "Their lordships do not think it necessary to examine in minute detail the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then existing between the Sovereign and the provinces. The object of the Act is neither to weld the provinces into one nor to subordinate provincial governments to a central authority, but to create a federal government in which they should be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy, that object being accomplished by distributing between the Dominion and the provinces all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion government should be vested with such of those powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purpose of provincial governments."[2]

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B.N.A. Act does not disturb the relations between the Sovereign and the provinces.

It was not its object to subordinate provincial governments to a central authority.

But to create a federal government for administration of affairs of common interest.

In Molson *v.* Lambe,[3] objection was actually taken to an Act of the Legislature of Quebec because it purported to be made and enacted by Her Majesty the Queen, while it was alleged that Her Majesty the Queen had no right or title to pass Acts binding on the province of Quebec, but this point was abandoned before the Supreme Court of Canada. How-

Use of Her Majesty's name in provincial legislation.

[1] [1892] A.C. 437, at pp. 441-2.

[2] See Propositions 61 and 64, and the notes thereto.

[3] 15 S.C.R. 253, M.L.R. 2 Q.B. 381, 1 S.C. 264, 4 Cart. 334, (1887-8).

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ever, we find, in 1875, the then Minister of Justice upholding the proposition in one of his reports, that :—"The Queen, not being in any way an enacting party or power of the provincial legislature, Her Majesty's name is improperly used in provincial legislation."[1]

The Thrasher Case.

And while upon the subject of the status of provincial Lieutenant-Governors, it may be worth while to refer to the views expressed by Begbie, C.J., in the Thrasher Case,[2] where, speaking of the ambiguity in the use of the epithet "provincial," he says :—"We may with equal propriety speak of a provincial lieutenant-governor or a provincial deputy adjutant-general, or, on the other hand, of a provincial minister or a provincial superintendent or minister of education. But the same epithet means two very different classes of officials. The former are allotted to, the latter derive from, the province. In the one case are meant officers appointed and authorized by some power without, *i.e.*, by the Dominion, to perform certain duties in the province. In the other case the officials draw all their authority from within the province itself. The former owe no allegiance to the province, nor any duty, except indirectly, having to carry out, according to their respective commissions, the laws duly established in the province, whether common law or statute laws; and as to statute laws, whether of Imperial, Dominion, or provincial enactment . . . They are not, however, responsible to any provincial authority, but only to the Dominion, whose creatures they are and whose mandate they bear. The latter class

Per Begbie, C.J.

Twofold use of word "provincial."

[1] Hodgins' Prov. Legisl., Vol. I., at p. 99. But see Todd's Parl. Gov. in Brit. Col., 2nd ed., pp. 439-40.

[2] 1 B.C. (Irving) at p. 161.

of officials owe allegiance to the province, and are under its sole authority, being of its creation. And I think this distinction has been sometimes lost sight of in discussing the British North America Act, leading to apparent anomalies in that Act which do not really exist." Prop. 7

To return to the leading proposition, it would seem to follow from it that it is altogether incorrect to say with Taschereau, J., in Lenoir *v.* Ritchie,[1] that :—"The Governor-General alone exercises the prerogatives of the Queen in her name in all the cases in which such prerogatives can be exercised in the Dominion by any one else than Her Majesty herself." The same learned judge, however, said in like manner, in Attorney-General of Quebec *v.* Attorney-General of the Dominion[2]:—"The Governor-General alone is the direct representative of Her Majesty in and for the whole Dominion, and to him alone, as such representative, is entrusted the exercise of the royal prerogatives, within the limits fixed by the constitution (and this constitution *for the Dominion* is partly written and partly unwritten), either resulting from our dependence on England, or still further prescribed by the special instructions which Her Majesty is pleased to give him." It would certainly seem that the proper person to exercise the prerogatives of the Queen in matters of provincial government must be the Lieutenant-Governor, who is her representative in respect to them.

Not correct to say Governor-General alone exercises the prerogatives of the Queen.

Or that he alone is her direct representative.

Lieutenant-Governor exercises royal prerogatives in matters of provincial government.

So, too, it would seem impossible now to defend the dictum of Tessier, J., in Attorney-General of

Per Tessier, J., *aliter.*

[1] 3 S.C.R. at p. 624, 1 Cart. at pp. 530-1.

[2] 1 Q.L.R. at p. 181 (*sub nom.*, Church *v.* Blake), 3 Cart. at p. 114.

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Quebec *v.* Attorney-General of the Dominion,[1] where he observes that the statement that it is the Governor-General, and not the Lieutenant-Governor, who is the Queen's representative is "true in regard to the special attributes of royalty which Her Majesty can delegate and confer by and in virtue of her royal prerogative and instructions; but it is not true in regard to those matters over which Her Majesty the Queen has no longer any direct power, such as the public lands and the rights of property, and civil rights in each province." For, just as in The Liquidators of the Maritime Bank *v.* The Receiver-General of New Brunswick,[2] the Privy Council point out that the act of the Governor-General and his Council in appointing Lieutenant-Governors is, within the meaning of the British North America Act, an act of the Crown; and that "a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself for all purposes of Dominion government," so any powers which under his commission and instructions a Governor-General can confer upon Lieutenant-Governors of provinces must be considered to be delegated to them by Her Majesty as much as are those which she delegates and confers upon the Governor-General.

The Privy Council.

Delegated powers of Lieutenant-Governors come from Her Majesty through the Governor-General.

How far and in what manner Governor-Generals and Lieutenant-Governors are vested with royal prerogative rights and powers.

The Governor-General, then, and the Lieutenant-Governors of provinces being alike, in their respective spheres, the representatives of Her Majesty, the question remains how far and in what manner they are invested with the power and duty of exercising her royal prerogatives. Under the general

[1] 2 Q.L.R. at p. 241, 3 Cart. at p. 105, (1876).

[2] [1892] A.C. at p. 443.

practice throughout the Empire, "the Queen," as Sir W. Anson says in his recent work on the Crown, "is represented in each colony by a governor, who is appointed by commission, and who is limited as to his powers by the letters patent which constitute his office, and the instructions which inform him in detail of the manner in which his duties are to be fulfilled,"[1] and in the case of the Governor-General, and of the provincial Lieutenant-Governors also, we should look to their commissions and instructions to see with what prerogative powers they have been invested. Furthermore, as we have already seen (*supra* pp. 98-9), power to represent the Queen in certain specified matters has been expressly conferred upon Lieutenant-Governors by various sections of the British North America Act, and so also has it been upon the Governor-General.[2] But a somewhat startling theory has been recently advocated, or rather insisted on, by the Ontario government in connection with this subject, so far as relates to Canada, in a despatch from the Lieutenant-Governor to the Secretary of State, of January 22nd, 1886.[3] The contention in that despatch is that all government and all executive authority are matters of prerogative, and that :—"The Lieutenant-Governor is entitled, *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters over which provincial legislatures have jurisdiction, as the Governor-

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Partly by their commissions and instructions.

Partly by express provision in B.N.A. Act.

A new theory.

[1] At p. 260. See Musgrave *v.* Pulido, 5 App. Cas. at p. 111, (1879); Hill *v.* Bigge, 3 Moo. P.C. at p. 476, (1841); Cameron *v.* Kyte, 3 Knapp's P.C. at p. 344, (1835). Also the judgment of Strong, C.J., in the pardoning power case, Attorney-General of Canada *v.* Attorney-General of Ontario, 23 S.C.R. 458.

[2] See sections 11, 24, 34, 38, 55, 58, 59, 63, 75, 82, 85, 90, 96, 99, 131, 134.

[3] Ont. Sess. Pap., 1888, No. 37, at pp. 20-22.

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That they are vested, *virtute officii*, with all prerogatives incident to executive authority in matters within their respective spheres.

General is entitled, *virtute officii*, and without any statutory enactment, to exercise all prerogatives incident to executive authority in matters within the jurisdiction of the federal parliament; a Lieutenant-Governor has the administration of the royal prerogatives as far as they are capable of being exercised in relation to the government of the province; as the Governor-General has the administration of them, so far as they are capable of being exercised in relation to the government assigned to the Dominion . . . In the absence of any express delegation or legislation, my government insist that the Governor-General and Lieutenant-Governors have respectively, under their commissions, all powers necessary and proper for the administration of their respective governments, all powers usually given to or exercised by colonial governors." And this view is defended thus:—"My government do not question that 'it is a well-established rule, generally speaking, in the construction of Acts of parliament, that the King is not included unless there be words to that effect; for it is inferred *primâ facie* that the law made by the Crown with the assent of Lords and Commons is made for subjects, and not for the Crown.' But what they claim is, that this reason does not apply to an Act the express object of which is to grant a constitution, a legislature and an executive, to colonies of the Empire.[1] My government insist that all government and all executive authority are matter of prerogative, and that in a sense legislation is so likewise, for the royal assent is necessary to legislation. In the case, therefore, of a constitutional Act there is no presumption that general provisions contained in it were not intended to include any matter of

Contention that rule that Crown not affected by general statutory provisions, where not expressly mentioned, not applicable to B.N.A. Act.

[1] See *supra* pp. 28–40.

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prerogative which, in the absence of the rule of interpretation referred to, would be covered by the general words employed. My government inform me that they are not aware of any judicial authority for applying the rule, and they claim that it is not applicable, to an Act by which 'Her Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in Parliament assembled,' grants to one of her colonies a constitution for regulating its own affairs in legislation and government. Such a constitution cannot be created without dealing with prerogative. The British North America Act from beginning to end deals with matters of prerogative, and mostly without any express naming of the Queen."

It deals throughout with matters of prerogative.

The Pardoning Power, or Executive Power case.

And in the Pardoning Power, or Executive Power case, Attorney-General of Canada *v.* Attorney-General of Ontario,[1] Mr. Edward Blake strenuously argued in support of this view.[2] It was not, however, necessary to the determination of that case to decide the matter, and only one judge, Burton, J.A., referred to it in giving judgment. That learned judge, however, says[3]:—"I have always been of opinion that the legislative and executive powers granted to the provinces were intended to be co-extensive, and that the Lieutenant-Governor became entitled, *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters in which provincial

Per Burton, J.A.

[1] 20 O.R. 222, 19 O.A.R. 31, 23 S.C.R. 458, (1890-4). See the case further referred to in the notes to Propositions 8 and 9, *infra* pp. 130-3.

[2] See his argument before the Court of first instance as reported 20 O.R. 222, and before the Ontario Court of Appeal, as published *verbatim* by the press of the *Budget*, 27 Melinda Street, Toronto, 1892, under the title, "Executive Power Case."

[3] 19 O.A.R. at p. 38.

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He supports this theory.

legislatures have jurisdiction; that he had, in fact, delegated to him the administration of the royal prerogatives as far as they are capable of being exercised in relation to the government of the provinces, as fully as the Governor-General has the administration of them in relation to the government of the Dominion."[1]

[1] In his "Letters upon the Interpretation of the Federal Constitution," (first letter), already several times referred to, Mr. Justice Loranger reaches a similar conclusion. He argues (pp. 10-11) that inasmuch as sovereignty is indivisible, inasmuch as in both public and private law it is a principle that the powers exercised by the representative are, unless limited, identically those of the person represented, and inasmuch as the British North America Act does not contain any restrictions, the Privy Council by recognizing in The Attorney-General of Ontario *v.* Mercer, 8 App. Cas. 767, 3 Cart. 1, the power of Lieutenant-Governors of provinces to exercise a right appertaining to the royal prerogative, that of claiming the right to escheats, has recognized all the others. This, however, would seem to be making the Lieutenant-Governors viceroys in respect to provincial matters, whereas it is well decided that a colonial governor under the British system is not a viceroy, but is vested with an authority limited by the terms of his commission and instructions, and, of course, by the terms of any valid statute conferring authority upon him, or regulating his powers: Musgrave *v.* Pulido, L.R. 5 App. Cas. 102; Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 34, *seq.* and *passim.* It is submitted, with great deference, that the view expressed by Burton, J.A., in the passage above cited, and contended for by Mr. Edward Blake, as above stated, is not in accordance with what Strong, C.J., in his judgment in the Executive Power case, 23 S.C.R. at pp. 468-9, speaks of as "the general constitutional law of the Empire," *infra* p. 180. It is part of the general view elaborated by Mr. Blake in his argument above referred to, namely, that the provinces, on the one hand, and the Dominion, on the other, are possessed under the British North America Act, and subject to its provisions, with complete sovereign powers, as well executive as legislative, within their respective spheres; whereas it is submitted that in accordance with the general law of the Empire, such powers of the Crown as are not expressly conferred by the British North America Act, or have not been dealt with by statute, local or imperial, exist, whether in the Dominion or the provinces, only by delegation from the Sovereign of Great Britain, and, until so taken possession of, as it were, by statute law, can be withdrawn, or modified and regulated, by the Sovereign, acting under the advice of her Imperial Ministers, as to the Governor-General directly, and as to Lieutenant-Governors mediately through the Governor-General. And this seems entirely borne out by the correspondence with the Imperial government over the Nova Scotia Great Seal case. It will be remembered that section 136 of the British North America Act provided that "until altered by the Lieutenant-Governor in Council," the Great Seals of Ontario and Quebec should be the same as those of Upper and Lower Canada, respectively, before the union as the province of Canada. But there is no provision in the Act as to the Great Seals of Nova Scotia and New

So also per Loranger, J.

Sed quære.

Colonial governors are not viceroys.

Reserve of executive control in Imperial government.

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As already stated, none of the other judges who sat on this case passed upon the matter, but Strong, C.J., and Gwynne, J., speak in such a manner as clearly shows that they would not have upheld it.[1]

Similar theory mooted in Australia.

By a curious coincidence, in the Australian colony of Victoria a similar theory as to the right to exercise all prerogative powers relating to the local affairs of the colony being vested in the Governor, by virtue of the Constitution Act, though not

Brunswick. Accordingly in a despatch of August 23rd, 1869, Lord Granville, after taking the advice of the law officers of the Crown, states that he entertains no doubt that in Her Majesty alone is vested the power to change at will the Great Seals of the provinces of New Brunswick and Nova Scotia, but that he was advised that the assent of the Crown being first obtained local Acts afterwards assented to by the Crown would be a legal mode of empowering their Lieutenant-Governors to alter the Great Seals of those provinces from time to time : (Can. Sess. Pap., No. 86, at p. 7). This shows that in the view of the law officers of the Crown the prerogative power even over so very local a matter as the form of the provincial Great Seals, not having been expressly dealt with by the Act, was vested (not in the Lieutenant-Governors, *virtute officii*, as Mr. Blake would have it), but in Her Majesty. Nevertheless, with the prior assent of the Crown (such requirement being apparently in accordance with the usage of the Imperial parliament before dealing by statute with the prerogatives of the Crown ; see *infra* p. 178, n. 1), a local Act might be passed, probably under No. 16 of section 92,—"matters of a merely local or private nature in the province,"—in reference to the matter. The point, however, is not without importance, for any such Act is subject to disallowance by the Governor-General in Council, and it is a very different thing that provincial legislatures should have control over royal prerogatives immediately relating to the subjects over which they have legislative jurisdiction, from the Lieutenant-Governors having such prerogatives vested in them *virtute officii*. As to the power of Canadian legislatures to affect the royal prerogatives, see *infra* pp. 176-184. And as to the Nova Scotia Great Seal case, see further *infra* p. 134, n. 1.

The Great Seal case.

No. 16 of sect. 92, B.N.A. Act.

[1] 23 S.C.R. 458. In The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick, 20 S.C.R. at p. 698, however, Taschereau, J., says :—"In my opinion, under the British North America Act the executive power in the provinces is, as a general rule, vested with the same rights and privileges in the administration of the functions, powers, and duties thereto assigned under this Act as are attached to analogous functions, powers, and duties of the executive authority in England ;" and he says that such was his opinion when he decided Church *v.* Middlemiss, 21 L.C.J. 319, (see *supra* p. 97), adding :—"Though I admit now that in order to reach this conclusion it is not necessary to hold, as I did in that case, that Her Majesty forms part of the provincial executive authority."

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expressly therein conferred, was propounded by counsel, and received the support of the Chief Justice of the Supreme Court of the colony, and of one of the other judges in the recent case of Toy *v.* Musgrove,[1] though the four remaining judges took the other view, namely, that certain of such prerogatives, and no others, were, by the provisions of the Constitution Act and his commission, conveyed to the Governor as representative of the Queen. The Chief Justice sums up his conclusion on the point thus[2]:—"The executive government of Victoria possesses and exercises necessary functions under and by virtue of the Constitution Act similar to and co-extensive, as regards the internal affairs of Victoria, with the functions possessed and exercised by the Imperial government with regard to internal affairs of Great Britain." Therefore, with entire consistency, he held that, in the exercise of his powers as head of the executive government of Victoria, the Governor was not an agent of the Crown, nor an officer of the Secretary of State for the Colonies:—"A new and distinct authority is conferred upon him by law on his appointment; he is created, for all purposes within the scope of the Constitution Act, the local Sovereign of Victoria," and he held that the Crown had no longer any right to "instruct" the Governor with reference to the exercise of his powers as such head of the executive of the colony, and that anything to the contrary in his commission or instructions was illegal and void. At the same time he admits, of course, that "all the prerogatives and powers of the Sovereign

Toy *v.* Musgrove.

Per Higinbotham, C.J.

The Governor a local Sovereign.

[1] 14 V.L.R. 349, (1888), referred to, but not discussed, by Strong, C.J., in the last-mentioned case of Attorney-General of Canada *v.* Attorney-General of Ontario.

[2] 14 V.L.R. at p. 397.

are not vested by law in the Queen's representative in Victoria, nor can all of them be the subject of advice to the Governor by the Queen's ministers for Victoria. The prerogatives of war and peace, of negotiation and treaty, together with the power of entering into relations of diplomacy or trade, and holding communication with other independent states, to some one, or all, of which the power to do an act which shall constitute an act of State appears to be annexed, have not been vested in the Governor of Victoria by law express or implied." And so Kerferd, J., in the same case, says[1]:—"If the Crown," (*sc.*, in the Colony of Victoria), "is restricted to the use of those prerogatives mentioned in the Constitution Act and the Governor's commission, then all other prerogatives must be deemed to be excluded. I can find no authority in support of such a contention . . I would say that all the prerogatives necessary for the safety and protection of the people, the administration of the law, and the conduct of public affairs in and for Victoria, under our system of responsible government, have passed as an incident to the grant of self-government (without which the grant itself would be of no effect), and may be exercised by the representative of the Crown on the advice of responsible ministers."

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Though not possessing all prerogatives.

So also per Kerferd, J.

But, as already stated, the other four judges did not concur in this view, but held that, even if the prerogative power then in question, viz., that of excluding aliens from entering the colony, could be properly regarded as one relating to the local affairs of the colony, yet the Governor had it not either under the Constitution Act or his commission and

[1] 14 V.L.R. at pp. 409, 411.

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instructions. Wrenfordsley, J., says[1]:—"I am not aware of any authority to the effect that in a settled colony like Victoria the Act of Constitution carries with it powers outside or beyond the exact terms of the grant itself." A'Beckett, J., says:—"Assuming that the right to exclude aliens subsisted in England as part of the royal prerogative when our Constitution Act was passed, I can find nothing in the Act, or in the system of government which it originated, authorizing the exercise of this right by the advice of Ministers in Victoria. It was argued that the authority must be given because responsible government was given, as if the phrase 'responsible government' had a definite, comprehensive meaning, necessarily including the power in question. The phrase has, to my mind, no such force. Responsibility may attach to persons having powers strictly limited, and its existence does not indicate the extent of the authority from which it arises. For this we must look to the terms in which the authority was conferred, that is to say, to the Act of parliament establishing the system, and to the documents delegating powers to the governor who administers it, to ascertain whether by express words or necessary implication the right to exclude aliens has been given." Lastly, Holroyd, J., says, in a passage which also seems worth quoting[2]:—"By the Constitution Act itself certain powers are conferred upon the Governor, similar to some of those which in the United Kingdom the Queen enjoys as her exclusive privilege, notably that of proroguing the Council and Assembly, and

Aliter per Wrenfordsley, J.

And per A'Beckett, J.

Responsible government by no means necessitates such a theory.

So, also, per Holroyd, J.

[1] 14 V.L.R. at p. 437. As to constitutional limitations of the powers of colonial legislatures in respect to providing for the removal of persons out of their jurisdiction to other places, see the notes to Proposition 26.

[2] 14 V.L.R. at p. 429. See, also, per Williams, J., S.C. at p. 419.

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dissolving the Assembly; that of appointing any officers liable to retire on political grounds, and that of appointing, with the advice of the Executive Council, all other public officers under the government of Victoria. Powers of this class having been bestowed in express terms, we ought to presume, according to the ordinary rule of construction, that no others of the same class were intended to pass. The rule is not one of universal application, but, in the present instance, it should be rigidly applied, inasmuch as it is still a fundamental maxim, that the Crown is not bound by any statute, unless expressly therein named, and, as a corollary, the royal prerogative cannot be touched except in so far as therein expressed. It is, moreover, conceded that the exclusion of aliens is not a local affair in its consequences, which might affect the whole Empire; and that circumstance furnishes an additional reason for not implying an intention on the part of the Home Government to vest in the Governor a power which his advisers here might recommend him to execute, in a manner detrimental to Imperial interests. Except in so far as his position has been altered by positive enactment of the Home parliament, or by some statute passed here and assented to by Her Majesty, the Governor himself is the servant of the Crown, tied down by his commission and instructions. It is not pretended that he has been permitted by either to shut out or to remove aliens; and if no such authority has been distinctly vested in him by statute, or delegated to him by the Queen, we may safely conclude that he does not possess it." The case was carried to the Privy Council,[1] but the appeal was decided on other grounds, and their lordships say that, this being so, they do not deem

Crown not bound unless expressly named.

Subject to statutory enactment, the powers of colonial governors are restricted to those provided for in their commissions and instructions.

[1] [1891] A.C. 272.

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The Privy Council.

it right to express any opinion on "what rights the executive government of Victoria has, under the constitution conferred upon it, derived from the Crown." It involves important considerations and points of nicety which could only be properly discussed when the several interests concerned were represented, and which may "never become of practical importance."[1]

Express provisions of B.N.A. Act opposed to the above theory.

To return to the British North America Act, there are express enactments in it which seem very clearly to show, in opposition to the theory of the apportionment by it of royal prerogatives in relation to Canada above referred to, that all prerogative functions and powers not specifically bestowed by its provisions upon the Governor-General or Lieutenant-Governors remain vested in Her Majesty.

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Thus, in section 9, the executive government and authority over Canada is declared to continue and be vested in the Queen; by section 14 it is provided

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that it shall be lawful for the Queen, if she thinks fit, to authorize the Governor-General from time to time to appoint deputies; by section 15, that the

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command-in-chief of the naval and military forces

[1]It appears that on December 22nd, 1869, the Legislative Assembly of Victoria went so far as to pass the following resolution (Parliamentary Debates, Vol. 9, pp. 2670-1):—"That the official communication of advice, suggestions, or instructions by the Secretary of State for the Colonies to Her Majesty's representative in Victoria on any subject whatsoever connected with the administration of the local government, except the giving or withholding of the royal assent to or the reservation of bills passed by the two Houses of the Victorian parliament, is a practice not sanctioned by law, derogatory to the independence of the Queen's representative, and a violation both of the principle of responsible government and of the constitutional rights of the people of this colony." It seems, however, that no notice was taken by the Imperial government of this protest, and the practice condemned in the resolution remains unaltered. See 14 V.L.R. at p. 385. The royal instructions are directly referred to in section 55 of the British North America Act: see Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 35, *seq*.

continues and is vested in the Queen; and by section 16, that, until the Queen otherwise directs, the seat of government of Canada shall be Ottawa. The matter may or may not prove to be of much practical importance, but if the true meaning and intent of the theory under discussion is that the Imperial government cannot now instruct the Governor-General, and through the Governor-General the provincial Lieutenant-Governors, as to how they shall respectively exercise such prerogative powers in relation to Canadian affairs, as have not been regulated by valid statutory enactment, it is difficult to see how it can be said, as is said by the Judicial Committee in the case already referred to of The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick,[1] that the provisions of the British North America Act "nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces." Rather it may be said, in words suggested by another passage in that judgment, that, according to this view, the Governor-General and the Lieutenant-Governors, and not the Queen, whose deputies they are, became the sovereign authorities of the Dominion and the provinces respectively when the Act of 1867 came into operation. No such view, it is submitted, is necessarily involved in that maintained in connection with the next proposition, that executive power is, in the absence of restraining enactment, to be deemed correlative to and co-extensive with legisla-

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Liquidators of Maritime Bank *v.* Receiver-General of New Brunswick.

B.N.A. Act did not disturb relations between Sovereign and the provinces.

[1] [1892] A.C. 437, at p. 441. See *supra* pp. 85-6. *In re* Samuel Cambridge, 3 Mo. P.C. 175, (1841), may be referred to in this connection.

Prop. 7 tive power, even though such executive power be of a prerogative character."[1]

[1]The despatch of Lord Granville to Sir J. Young, of February 24th, 1869, after consulting the law officers of the Crown, in reference to the pardoning power (Can. Sess. Pap., 1869, No. 16), seems quite opposed to the view advanced by the Lieutenant-Governor of Ontario (*supra* pp. 111-2), and above discussed. Thus he says:—"By the British North America Act the authorities given to the several provincial Lieutenant-Governors were revoked, except so far as is otherwise therein provided. Among the revoked powers the power of pardoning would be one, unless specially excepted. Now, the Lieutenant-Governors of the provinces under the new system are to be appointed, not directly by the Queen, but by the Governor-General in Council, and the new Lieutenant-Governors would not take the power of pardoning *virtute officii* unless it were given by the Act. The whole constitution of the provinces was changed by the Act of Union, and the delegated powers of government necessarily ceased. No such power is given, or retained to or for them, in that part of the Act which is headed 'Provincial Constitutions.' Nor can it be properly said that the prerogative of mercy is part of the administration of justice; still less can it be argued that the Lieutenant-Governor possesses the power of pardon because the administration of justice in the province is reserved to the provincial legislature."

Lord Granville.

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8. Executive power is derived from legislative power, unless there be some restraining enactment.

9. The Crown is a party to and bound by both Dominion and Provincial statutes, so far as such statutes are *intra vires*, that is, relate to matters placed within the Dominion and Provincial control respectively by the British North America Act.

As long ago as 1871, in the Queen *v.* Pattee,[1] the Master in Chambers in Ontario said, after referring to sections 92 and 135 of the British North America Act:—"As is consistent and natural, the executive and legislative functions of the government of Ontario seem to be co-extensive;" and in Regina *v.* Horner[2] Ramsay, J., states that the general principle expressed in Proposition 8 was recognized by the Privy Council in Regina *v.* Coote,[3] where they held that the statutes of the Quebec legislature, 31 Vict., c. 32, 32 Vict., c. 29, appointing officers, named fire marshals, with power to examine witnesses under oath, and to enquire into

Executive and legislative powers co-extensive.

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[1] 5 O.P.R. at p. 297. This case decided that the Attorney-General of Ontario was the proper authority in that province to grant a fiat for *sci. fa.* proceedings to set aside a patent.

[2] 2 Steph. Dig. at p. 451, 2 Cart. at p. 318, (1876).

[3] L.R. 4 P.C. 599, 1 Cart. 57, (1873). See also the passage in the report of Sir John Thompson upon the Quebec District Magistrates Act, 1888, *infra* pp. 166-8.

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the cause and origin of fires, and to arrest and commit for trial in the same manner as a justice of the peace, was within the competence of the provincial legislature. Their lordships, however, do not themselves state their reasons for so holding.

Contrary *dicta* in Thrasher Case.

It has not been without dispute and some divergence of judicial opinion that the application of this principle to the constitution conferred upon the Dominion by the British North America Act has been established. Thus in the Thrasher Case,[1]

Per Begbie, C.J.

Begbie, C.J., says :—"The first thing to be observed upon section 92 of the British North America Act is that its object and intention, as well as expressed phraseology, is to confer a legislative power on a legislative body . . . The grant is to a purely legislative body of purely legislative functions, viz., a grant of power 'to make laws' in relation to civil rights and the administration of justice; and there is no grant here to the local legislature, enabling them to exercise either judicial or executive powers or functions in respect of any of the enumerated topics. In defining, asserting, ascertaining, and protecting civil rights, in administering justice, the share of the legislature is probably the most important. But the legislature has only a share in the work. A very important share in all this business belongs to the judiciary; a very important share to the executive alone; and it could not have been intended to give to the legislature power to perform both judicial and executive functions; and, at all events, it has not been expressly given . . . There

[1] 1 B.C. (Irving) at pp. 170-1, (1882). See this case referred to in Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 566, *seq.*; also a number of articles and letters upon it in Vol. 18 of *The Canada Law Journal*, especially two by Mr. Todd at pp. 181, 265; and a series of articles on Provincial Jurisdiction over Civil Procedure, 2 C.L.T. at pp. 313, 360, 409, 456, 513, 561.

might be somewhat to be said against this view if it reduced section 92 to a barren grant; if there were nothing left upon which the grant could operate. But this is by no means the case. The argument leaves to the local legislature, fully and unimpaired, all essentially legislative functions in respect to all the matters enumerated in section 92; all matters of substantive law; all, surely, that could have been intended to be given to the legislature of the province. The management of public lands and works, a large part of taxation, the whole law of inheritance to the real and personal property, the rights of creditors against the person and property of their debtors, of husband and wife, the law of juries and attorneys, and numberless other matters, are left to the local legislature; executive and judicial functions, however, are not given, and, therefore, are expressly forbidden to them even in regard to these topics."[1]

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View that sect. 92 of B.N.A. Act confers only legislative powers.

And in accordance with the views thus expressed, Begbie, C.J., held, with his fellow-judges, Crease and Gray, JJ., that section 28 of the British Columbia Local Administration of Justice Act, 1881, 44 Vict., c. 1, by which it was provided that the judges of the Supreme Court of the provinces should sit as a full Court only once a year, at such time as might be by rules of Court appointed, was *ultra vires* on the ground that[2] the Court was not a provincial Court within the meaning of No. 14 of section 92, and it is over the procedure of such

Judgments in the Thrasher Case.

[1] In *Re* Hamilton and North-Western R.W. Co., 39 U.C.R. at p. 112, (1876), Harrison, C.J., says:—"In the reading of the British North America Act one cannot fail to observe the distribution of powers into the three great divisions of executive, legislative, and judicial. To avoid conflict, the functions of each must, as far as practicable, be kept separate and distinct within its own sphere."

[2] At p. 174.

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provincial Courts alone that No. 14 gives the provincial legislature jurisdiction, and—"Whatever may be said of some topics, this, at all events, is pure procedure, and essentially of judicial cognizance. It is not a legislative function at all, any more than the adjournment of a part heard case. It, consequently, is not included in any general gift of legislative power. And, therefore, it is not conferred by the gift to a legislative body of a power to make laws in reference to civil rights and the administration of justice . . . If the Imperial parliament may, and does, from time to time, thus interfere beyond its proper legislative functions, that is by virtue of its universal sovereignty. No derivative legislature may do so, unless especially authorized in that behalf."

The Thrasher Case.

The Supreme Court of Canada, however, upon the question being referred to it by the Governor-General in Council, held that the legislature of British Columbia could make rules to govern the procedure of the Supreme Court of the province in all civil matters, and could delegate this power to the Governor-General in Council, and they also held that the provincial Act, 44 Vict., c. 1, was *intra vires* of the legislature of British Columbia.[1] Their lordships, unfortunately, as has hitherto been usual in such cases, did not give their reasons for this decision.

Overruled by Supreme Court of Canada.

[1]See the answers of the Supreme Court of Canada reported in the footnote to the report of the Thrasher Case, 1 B.C. (Irving), at pp. 243-4 : also Cass. Sup. Ct. Digest, at p. 480.

Sir J. Thompson as to references by government to Supreme Court of Canada.

[2]But see now 54-55 Vict., c. 25, s. 4, (D.). It may be here noted that in his report to the Governor-General of July 10th, 1889, in regard to a petition presented to the latter for the reference of The Jesuit Estate Act to the Supreme Court of Canada, Sir John Thompson, then Minister of Justice, reviews the different precedents for such references, and also for similar references, in England, by the government to the Judicial Committee of the Privy Council, arriving at the conclusion

Nevertheless, in the recent British Columbia case of Burk *v.* Tunstall,[1] Drake, J., seems to have held that the provincial Act in question in that case, authorizing the appointment of Gold Commissioners of Mining Courts, was *ultra vires*, not only because the intended Gold Commissioners were, in effect, Superior Court judges under another name,[2] but also because:—"It is a prerogative of the Crown to appoint all judges, and such prerogative cannot be taken away except by express words. This prerogative has been delegated to the Governor-General, and there is nothing in the Act taking this right away and vesting it in the Lieutenant-Governor," a view which, as will be more clearly seen presently, seems to ignore the application of the principle of Proposition 8 to the legislative powers comprised in No. 14 of section 92 of the British North America Act, respecting the administration of justice in the province.

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Burk *v.* Tunstall.

To return to the case of Regina *v.* Horner,[3] above referred to, the question before the Quebec Court of Queen's Bench there was whether the provincial Executive had the right to appoint district magistrates under the provisions of the then existing Acts

Reg. *v.* Horner.

that the object and scope of the enactments allowing such references are "not to obtain a settlement, by this summary procedure, of legal questions even of great public interest, or to obtain an adjudication upon private rights, but solely to obtain advice which is needed by the Crown in affairs of administration." This report was published in full in the Toronto *Empire* for August 12th, 1889. See, also, Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 539, *seq.*, and *ib.*, pp. 605-6; Doutre's Constitution of Canada, p. 348.

[1] 2 B.C. (Hunter) at p. 14, (1890).

[2] As to this objection, reference may be made to the Dominion Provident, Benevolent, and Endowment Association, 14 C.L.T. 467, (1894), where, in face of a similar objection, Armour, C.J., held that the Ontario legislature could confer upon Masters the powers given them by the Insurance Corporations Act, 1892.

[3] 2 Steph. Dig. 450, 2 Cart. 317, (1876).

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of the legislature of Quebec respecting district magistrates and magistrates' Courts in that province. It was contended that the Quebec legislature had no authority to legislate on these matters, and that, even if it had, the Lieutenant-Governor had no right to appoint a district magistrate, for that he is a district judge, and under the British North America Act, section 96, the Governor-General alone has the power to appoint such officers.[1] Ramsay, J., however, held that the district magistrate was not a district judge under that section, and that, on the authority of Regina *v.* Coote, above cited, and in accordance with the general principle of our leading proposition, the provincial Executive had power to appoint the district magistrates in question.

Per Ramsay, J.

The Privy Council in Hodge *v.* The Queen.

In Hodge *v.* The Queen,[2] again, the Privy Council held that, within the limits of section 92, local legislatures are supreme, and can confide to a municipal institution or body of their own creation authority to make by-laws or resolutions as to subjects specified

[1]The arrangement by which the Governor-General was to appoint the Superior, District, and County Court judges (section 96), while the provinces were to constitute the Courts, and in civil matters settle the procedure, was regarded by some with much dismal foreboding. See the speech of Mr. Dunkin in the debates on the Quebec resolutions in the parliament of Canada: Debates on Confederation, 1865, pp. 508-9. And as to the above cases of Reg. *v.* Horner and Reg. *v.* Coote, see the report of the Minister of Justice upon the Quebec Act of 1888 relating to district magistrates, *infra* pp. 167-9. In his Law of the Canadian Constitution (pp. 513-4), Mr. Clement discusses whether the power to appoint in section 96 carries with it the power to remove, section 99 of the Act applying only to Superior Court judges, and comes to the conclusion that it does, referring to *Re* Squier, 46 U.C.R. 474, 1 Cart. 789. On the same point the Niagara Election case, 29 C.P. at p 280, may be cited. See, also, an article on the Constitution of Canada, 11 C.L.T. 145, *seq.*; Todd's Parl. Gov. in Brit. Col., 2nd ed., at pp. 46-7, 827, *seq.*, who treats also of the powers of removal still existing under Imp. 22 George III., c. 75; and an article on the Right to remove County Court Judges, 17 C.L.J. 445. The Dominion Act, 45 Vict., c. 12, D., (1882), provides for the removal of County Court judges by order of the Governor-General in Council in certain cases.

[2]9 App. Cas. at p. 132, 3 Cart. at p. 162, (1883).

in the enactment, and with the object of carrying the enactment into operation and effect, saying :— "It is obvious that such an object is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail." And in the Court of Appeal of Ontario in that case[1] Strong, J., observes :—"The British North America Act confers a constitution distributively, as to powers of legislation, and, with those powers, necessarily all that was needful to make those powers effectual ;" and Burton, J.A., speaks much to the same effect, Patterson and Morrison, JJ.A., concurring.

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Powers ancillary to legislation.

Again, in Regina *v.* St. Catharines Milling and Lumber Co.,[2] Burton, J.A., says:—"If it is within the competency of the legislature of Ontario to legislate for the management and sale of these lands (*sc.*, the lands in question), as being public lands belonging to the province, it would follow that they have the minor power of empowering the Executive to make any agreement for the extinguishment of all the so-called Indian right."[3] And, in the same case,[4] Patterson, J.A., says:—"The administrative and the legislative functions I take to be made co-extensive by the Act, as indicated by, *inter alia*, section 130," which section of the British North America Act enacts:—"Until the parliament of Canada otherwise provides, all officers of the several provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the legisla-

Reg. *v.* St. Catharines Milling and Lumber Co.

Per Burton, J.A.

Per Patterson, J.A.

[1] 7 O.A.R. at p. 252, 3 Cart. at p. 168, (1882).

[2] 13 O.A.R. at p. 166, 4 Cart. at p. 208, (1886).

[3] But as to the extinguishment of Indian right, see 12 C.L.T. at p. 163.

[4] 13 O.A.R. at p. 171, 4 Cart. at p. 212.

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tures of the provinces shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities, and penalties as if the Union had not been made."

Bank of Toronto *v.* Lambe.

So in The North British and Mercantile Fire and Life Insurance Company *v.* Lambe, being the case generally known as Bank of Toronto *v.* Lambe,[1] Tessier, J., observes:—"Provincial legislatures are governments having the rights and privileges inherent in the exercise of government;" and Ramsay, J., in the same case,[2] likewise says:—"It would seem beyond question that this Act (*sc.*, the British North America Act) attributes plenary governmental powers with regard to certain matters to both the federal and local bodies, and, so far as I know, this has never been doubted. We have, therefore, one point settled. The local organizations are governments. They enjoy regalian powers, and all the incidents of such powers."

Per Tessier, J.

The Pardoning Power case.

And that the executive power is co-extensive with the legislative has been very clearly affirmed in the recent decision of Attorney-General of Canada *v.* Attorney-General of Ontario,[3] in the judgments in which, as well as in the arguments of counsel, the subject is discussed at length. There could, indeed, be no more exhaustive argument in favour of the Proposition under discussion than that of Mr. Edward Blake, in this case, already referred to as published *verbatim* under the title of "The Executive Power

[1] M.L.R. 1 Q.B. 122 at p. 163, 4 Cart. 24 at p. 57, (1885).

[2] M.L.R. 1 Q.B. at p. 188, 4 Cart. at p. 80.

[3] 20 O.R. 322, 19 O.A.R. 31, 23 S.C.R. 458, (1890-4). See *supra* pp. 113-5, where this case is referred to in connection with the Australian case of Toy *v.* Musgrove, 14 V.L.R. 349. Some comments on this case will also be found in 10 C.L.T. at p. 233, and 26 C.L.J. at p. 459.

Case."[1] The Ontario Act, 51 Vict., c. 5, the constitutionality of which was here under discussion, and which was held to be *intra vires*, purported to vest, ("so far as the legislature has power thus to enact,") in the Lieutenant-Governor of Ontario for the time being all powers, authorities, and functions which any of the ante-Confederation Governors or Lieutenant-Governors in Canada exercised at or before the passing of the Act, under commissions, instructions, or otherwise, in matters within the jurisdiction of the legislature of the province, subject always to the royal prerogative as theretofore; and it specially provided that this should be deemed to include the power of commuting and remitting sentences for offences against the laws of the province, or offences over which the legislative authority of the province extends. In the Court of first instance,[2] Boyd, C., in expressing his view of the matter, refers to the principle we are now discussing, and it will be seen that he holds that legislative power carries with it a corresponding executive power, though all executive power may be prerogative power, but he does not seem to go the whole length of holding that, by the British North America Act, there was made a distribution of all prerogative powers, so far as concerns the internal affairs of the Dominion, between the Governor-General and the Lieutenant-Governors of the various provinces.[3] He says:—"Now, it is a well-settled principle of public

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Legislative control over executive functions of Lieutenant-Governor.

Per Boyd, C.

[1] See *supra* p. 113, n. 2.

[2] 20 O.R. at pp. 249-50, (1890). On the general subject of the Imperial dominion exercisible over self-governing colonies by the administration of the prerogative of mercy, see Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 344, *seq.* And a reference to the following parliamentary papers in connection with this prerogative may also be of use:—Can. Sess. Pap., 1869, No. 16; *ibid.*, 1875, No. 11; *ibid.*, 1877, No. 13; Ont. Sess. Pap., 1888, No. 37; Imp. Hans., April 16, 1875, (3rd Ser., Vol. 223, p. 1065, *seq.*); Imp. Parl. Pap. (North Amer.), 1879, No. 99.

[3] As to which, see *supra* pp. 111-22.

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law that, after a colony has received legislative institutions, the Crown (subject to the special provisions of any Act of parliament) stands in the same relation to that colony as it does to the United Kingdom: *In re* The Lord Bishop of Natal, 3 Mo. P.C.N.S., at p. 148. Effective colonial legislation as to pardon may be attributed to the fact that the Crown is a constituent of the local law-making body . . The power to pass laws implies necessarily the power to execute or suspend the execution of those laws, else the concession of self-government in domestic affairs is a delusion. The sovereign power is a unity, and, though distributed in different channels and under different names, it must be politically and organically identical throughout the Empire. Every act of government involves some output of prerogative power. Prerogatives of the Crown may not have been in any sense communicated to the Lieutenant-Governor as representative of the Queen; and yet the delegation of law-making and other sovereign powers by the Imperial parliament to the legislature of Ontario may suffice to enable that body, by a deposit of power, to clothe the chief provincial functionary with all needful commuting and dispensing capacity, in order to complete its system of government."

Power to pass laws mplies power to execute.

Per Burton, J.A.

In the Ontario Court of Appeal,[1] Burton, J.A., also expresses his opinion that the legislative and executive powers granted to the provinces were intended to be co-extensive, and, as was seen in the notes to Proposition 7,[2] goes beyond this, and holds, as it would seem, that the Lieutenant-Governor is vested, *virtute officii*, with the administration of all

[1] 19 O.A.R. at p. 38, (1892).

[2] *Supra* pp. 113-4.

the royal prerogatives, so far as they are capable of being exercised in relation to the government of the provinces. The remaining judges in this Court, however, while agreeing in holding the Act *intra vires*, decide the matter on narrower grounds, as do also the judges of the Supreme Court of Canada, to which the case was afterwards carried,[1] though Strong, C.J., as will be seen, when considering Proposition 9, does refer to the matter of legislative power over the royal prerogative.[2] Gwynne, J., however, may be thought to countenance the view expressed in Proposition 8, when he says, referring to section 2 of the Ontario Act in question:—"If that section had been passed so as to enact that the Lieutenant-Governor should have the power of commuting and remitting sentences passed under the authority of item 15 of section 92 of the British North America Act, there would have been, I apprehend, no objection raised to such an enactment."

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The Supreme Court of Canada.

Per Gwynne, J.

And before proceeding further to review our own decisions in reference to the point under discussion, it may be observed that the opinion of Sir Horace Davey and Mr. Haldane, to whom questions were submitted by the Ontario government, dated December 9th, 1887, in reference to the appointment of Queen's Counsel,[3] seems to support our leading proposition as applied to legislative powers conferred by section 92 of the British North America Act, even where the executive power in question is clearly of a prerogative character. It does not, however, go the full length of upholding the supposed

Sir Horace Davey.

[1] 23 S.C.R. 458.

[2] See *infra* pp. 180-1.

[3] Ont. Sess. Pap., 1888, No. 37, at p. 30.

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wholesale distribution of prerogative powers by that Act, though the matter may be one of little present practical importance. The questions submitted to them were whether a Lieutenant-Governor of a province in Canada has power, as it were, *ex officio*, to appoint Queen's Counsel, and whether a provincial legislature has power to authorize the Lieutenant-Governor to make such appointments. They advised that the appointment of Queen's Counsel is the appointment to an office, and that under section 92, No. 4, (the establishment and tenure of provincial offices, and the appointment and payment of provincial officers), the provincial legislature has power to authorize Lieutenant-Governors to make such appointments for the purpose of the provincial Courts, but they say:—"We feel some doubt as to the power of the Lieutenant-Governor of any province, other than Ontario or Quebec, to create Queen's Counsel with or without the incidental privilege of pre-audience. But in regard to Ontario and Quebec, we think, having regard to section 134 of the British North America Act, that the Lieutenant-Governors of the provinces can create Queen's Counsel for the purposes of the provincial Courts. Whether the Lieutenant-Governors can regulate the precedence of the members of the provincial Bars *inter se* is, in our opinion, one (*sic*) of some difficulty. On the whole, we think not."[1]

As to power to appoint Queen's Counsel.

[1]And see Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 327, for the case of an Act of the South Australia legislature being disallowed by the Imperial government "as an encroachment upon the undoubted prerogative of the Queen, as the fountain of honour, to determine the precedence of her subjects." Also see *ib.*, p. 339, *seq.*, in reference to the matter of the Nova Scotia Great Seal, especially at p. 340, where a despatch of the Secretary of State for the Colonies of August 23rd, 1869, (Can. Sess. Pap., 1877, No. 86, p. 7), is cited, wherein he expressed his conviction that the right of Her Majesty exclusively to

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And with this may be compared the opinion of the law officers of the Crown in England given in 1872, on a case stated by Sir John Macdonald, in which they advised that—"The Governor-General has now power as Her Majesty's representative to appoint Queen's Counsel, but a Lieutenant-Governor appointed since the Union came into effect has no such power of appointment," but "the legislature of a province can confer by statute on its Lieutenant-Governor the power of appointing Queen's Counsel."[1]

The law officers of the Crown.

Sir G. C. Lewis' "Government of Dependencies."

And in Sir George Cornewall Lewis' Essay on the Government of Dependencies more than one passage may be found which supports our leading proposition. Thus he says[2]:—An Act of legislation by a sovereign government implies the necessity of future executive acts, and every executive act presupposes a prior legislative Act which is carried into execution." And again[3]:—"With respect to the comparative importance of the legislative and executive powers, it may be observed that a sovereign government possesses both, and that, inasmuch as each of these powers implies the other, neither can exist alone . . The power of making laws implies the power of determining the delegation of executive functions to subordinate officers, since it is by means of laws that the delegation is made."

order and to change at will the Great Seals of the provinces, having been an existing right before the passing of the British North America Act, cannot be deemed to have been taken away by implication to be inferred from section 136 of that Act. See, also, *ib.*, p. 596; and Doutre's Constitution of Canada, pp. 375-6. See *supra* pp. 104, n. 2, 114.

[1] Can. Sess. Pap., 1873, No. 50, p. 3. See *supra* p. 88, *infra* p. 136.

[2] Ed. 1891, by C. P. Lucas, at p. 16.

[3] *Ib.* at p. 66.

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Other cases supporting Prop. 8.

Proceeding now to consider such decided cases not already referred to as illustrate our leading proposition, one of the earliest is Queen *v.* Reno,[1] where Draper, C.J., held that an Act of the Ontario legislature continuing in force an Act of the old province of Canada which authorized the government to appoint police magistrates was valid. He held that the latter Act related to the administration of justice, and was within the power of the legislature of Ontario. We may compare with this Regina *v.* Bennett,[2] where it was likewise held by the Ontario Queen's Bench Division that the right of provincial legislatures to legislate in relation to the administration of justice includes a right to make provision for the appointment of police magistrates and justices of the peace by the Lieutenant-Governor, though, per Cameron, J., it did not follow that it included the right to create Queen's Counsel, the status of whom "is one of mere honour and dignity, and not necessarily connected with the administration of justice."[3]

Queen *v.* Reno.

Reg. *v.* Bennett.

In re Wilson *v.* McGuire.

On the same principle, in *In re* Wilson *v.* McGuire,[4] the majority of the Ontario Court of Queen's Bench held that provincial legislatures have complete jurisdiction over Division Courts, and may appoint the officers to preside over them, Hagarty, C.J., observing:—"As they (*i.e.*, the local legislatures) have power to abolish such Courts, and to

[1] 4 O.P.R. 281, 1 Cart. 810, (1868).

[2] 1 O.R. 445, 2 Cart. 634, (1882).

[3] 1 O.R. at p. 460, 2 Cart. at p. 640. As to this matter of Queen's Counsel, see also per Taschereau, J., in Lenoir *v.* Ritchie, 3 S.C.R. at pp. 627-9, 1 Cart. at pp. 534-5, (1879), and *passim* in that case; also Hodgins' Prov. Legisl., etc., Vol. 1, pp. 26-7; *ibid.*, Vol. 2, pp. 25, 26-7. And see *supra* p. 88, n. 2.

[4] 2 O.R. 118, 2 Cart. 665, (1883). Cf. Ganong *v.* Bayley, 1 P. & B. 324, 2 Cart. 509, (1877). See *infra* pp. 169-70.

establish others for the disposal of the like or other classes of business, I assume their right to appoint officers to preside over them." Armour, J., however, took a different view from his brother judges in this case, for, after observing that even without section 96 of the British North America Act the power to appoint County Court judges would have resided with the Governor-General, as representing Her Majesty in the Dominion,[1] and that the power of the local legislatures to appoint judges of the Division Court was not, in his opinion, involved in this case, he adds[2]:—"When that question shall arise I will, I trust, be able to show by satisfactory reasons that the local legislature has no such power. The reasoning of the Supreme Court in Lenoir *v.* Ritchie, 3 S.C.R. 575, in which case that Court determined against the power of the local legislatures to appoint Queen's Counsel, is altogether against their having the power to appoint any judges." Thus he, evidently, did not consider that No. 14 of section 92 of the British North America Act, whereby provincial legislatures can make laws in relation to "the constitution, maintenance, and organization of provincial courts," etc., carries with it the power to appoint any judges at all.[3] But the later case of Regina *v.* Bush[4] would seem

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Per Armour, J.

No. 14 of sect. 92, B.N.A. Act.

Reg. *v.* Bush.

[1] As to which, however, see The Maritime Bank of Canada *v.* The Receiver-General of New Brunswick, [1892] A.C. 437; and Proposition 7, *supra*.

[2] 2 O.R. at pp. 128-9, 2 Cart. at p. 677.

[3] For some discussion of the meaning of the words "constitution, maintenance, and organization" in section 92, No. 14, and section 101, see the articles on "Provincial Jurisdiction over Civil Procedure" in Vol. 2 of *The Canadian Law Times*, especially at p. 521, *seq.*, and p. 561, *seq.*, and also an article on the power of provincial legislatures to limit appeals to the Supreme Court, *ibid.*, at p. 416, *seq.*

[4] 15 O.R. 398, 4 Cart. 690, (1888). See *infra* pp. 175-7. Reference may also be made on this question to the Nova Scotia County Court

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to show a change of view, for Armour, C.J., there concurs with Street and Falconbridge, JJ., of the Ontario Court of Queen's Bench, in holding that the provincial legislatures have, by virtue of No. 14 of section 92, not only the power, but the exclusive power, to pass laws providing for the appointment of justices of the peace, subject to the royal prerogative power of appointment which still exists, though he says that such prerogative power has not been exercised in Ontario since the passing of the British North America Act, and adds[1]:—"Having regard to the purposes for which and the circumstances under which the British North America Act was passed, it cannot, I think, be doubted that the power was thereby conferred either upon the parliament of Canada or upon the legislatures of the provinces to pass laws providing for the appointment of justices of the peace, and this Act, having been assented to by the Crown, was in derogation of the prerogative right of the Crown to appoint justices of the peace, although it did not deprive the Crown of that right . . It is under this power (subsection 14 of section 92), given to the provincial legislatures to make laws in relation to the administration of justice in the province, that those legislatures have, if at all, the power to pass laws providing for the appointment of justices of the peace. Laws providing for the appointment of justices of

Reg. *v.* Bush.

Power to appoint justices of the peace.

case of Denton *v.* Daley, (1880), the judgment in which is fully reported in Doutre's Constitution of Canada, at p. 54, *seq.*, where it was held that the power to appoint justices of the peace rests solely with the Governor-General, in the absence of any delegation thereof to Lieutenant-Governors in their commission or instructions, but this is apparently without reference to any power the local legislatures may have to provide for the appointment of justices of the peace under Nos. 14 and 16 of section 92 of the British North America Act. See, however, Todd's Parl. Gov. in Brit. Col., 2nd ed., pp. 597-8.

[1] 15 O.R. at p. 400, 4 Cart. at pp. 692-3.

the peace are, it is contended,—and, I think, rightly, —laws in relation to the administration of justice, for the appointment of justices of the peace is a primary requisite to the administration of justice; and, if this contention be correct, the passing of such laws is exclusively within the power of the provincial legislatures." And he cites the cases of Queen *v.* Reno and Regina *v.* Bennett, above referred to. Prop. 8-9

And in the previous case of Richardson *v.* Ransom,[1] Wilson, C.J., expressed the view that local legislatures can provide for the appointment of justices of the peace, but was evidently not so clear as the judges who decided Reg. *v.* Bush[2] that they had the exclusive power. He said[3]:—"The Dominion parliament has, by section 91 of the British North America Act, power 'to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.' It is not necessary to enquire how far that enactment would enable the Dominion parliament to legislate with respect to the appointment of justices of the peace and police magistrates in any province of the Dominion, and to authorize the Governor-General to make such appointments, as with relation to the public works, 32-33 Vict., c. 24, s. 7, (D.), or to the management of Indian affairs, as by declaring that an Indian agent shall have the same power as a stipendiary magistrate, 45 Vict., c. 30, s. 3, (D.). Richardson *v.* Ransom. Per Wilson, J.

[1] 10 O.R. 387, 4 Cart. 630, (1886).

[2] 15 O.R. 398, 4 Cart. 690, (1888).

[3] 10 O.R. at p. 392, 4 Cart. at p. 635.

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Reg. *ex rel.* McGuire *v.* Birkett.

In Reg. *ex rel.* McGuire *v.* Birkett,[1] the principle of Wilson *v.* McGuire[2] was followed, and it was held that the provincial legislatures had power to invest the Master in Chambers at Toronto with authority to try controverted municipal election cases, for, as observed by MacMahon, J. (at p. 173) :—"As the provincial legislature has the exclusive right to make laws relating to municipal institutions, it carries with it the authority to create the tribunal for the trial of contested elections, and the appointment of a magistrate or other officer to hear and determine the validity thereof," subject, of course, as he intimates, to section 96 of the British North America Act, by which the power to appoint Superior, District, and County Court judges rests with the Governor-General.

Sir J. Thompson's report on the Quebec District Magistrates' Act.

And some of the cases just passed in review are discussed, and the successive provincial Acts in reference to the appointment of magistrates, judges, etc., reviewed, and the course taken with regard to them by Ministers of Justice pointed out, in the report of Sir John Thompson, as Minister of Justice, on the subject of the disallowance of the Quebec Act, 51-52 Vict., c. 20, being an Act to amend the law respecting district magistrates.[3] This able state paper is subsequent to the period covered by Mr. W. E. Hodgin's compilation,[4] and is so instruct-

[1] 21 O.R. at p. 162, (1891).

[2] 2 O.R. 118, 2 Cart. 665, (1883).

[3] The report was affirmed by the Governor-General in Council on January 22nd, 1889. The Act in question had been disallowed by Order in Council of September 7th, 1888.

[4] Correspondence, Reports of the Ministers of Justice, and Orders in Council upon the subject of Provincial Legislation, compiled under the direction of the Minister of Justice, by W. E. Hodgins, M.A., barrister-at-law, of the Department of Justice, Ottawa. This has already been cited in many places under the short title of Hodgin's

ive that, in spite of its length, it seems expedient to reproduce it here.[1] It is as follows :— Prop. 8-9

Sir J. Thompson's report on Quebec District Magistrates' Act, 1888.

"The undersigned has had referred to him a despatch from his Honour the Lieutenant-Governor of the Province of Quebec, dated the 2nd day of October last, transmitting a copy of an Order in Council, passed on that day by his Honour's government, on the subject of the disallowance of the Act of the province of Quebec to amend the law respecting district magistrates, being chapter 20 of 51-52 Victoriæ.

"The undersigned has the honour to make the following observations on this Order in Council :—

Synopsis of the Act.

"The disallowed Act recited that 'in the judicial district of Montreal the number of cases in civil matters before the Superior Court and the Circuit Court' was 'so great that, notwithstanding the permanence of the sittings of such Courts, the judges presiding therein' were 'unable to hear and deter-

Provincial Legislation. And as reports of Ministers of Justice are often referred to in this work, it may be well to repeat here, as a note of warning, the words of Mr. Edward Blake, (whose own reports as Minister of Justice are so conspicuous), in the argument in *In re* Portage Extension of the Red River Valley Railway, Cass. Sup. Ct. Dig. 487, (printed *in extenso* by A. S. Woodburn, Ottawa, 1888) :— "I do not understand that even apart from the special circumstances of this case, your lordships would pay any particular attention to the circumstance that the Minister of Justice on an *ex parte* proceeding, without anybody complaining, without his attention having been called to those facts, is to be considered as a judicial authority whose conclusion when he is advising the Executive,—sometimes, it is whispered, upon political considerations, as well as upon those strictly legal considerations which alone should animate him in the discharge of that duty,—is to be considered by your lordships :" (p. 105). These objections, however, to the value of reports of Ministers of Justice as opinions on the law of legislative power in Canada are obviously much more applicable in some cases than in others, and in many would seem not to apply at all; and it is believed that in the extracts made from such reports in this book much will be found which is valuable and suggestive.

[1] See Can. Sess. Pap., 1889, 47c., and Todd's Parl. Gov. in Brit. Col., 2nd ed., pp. 568-70.

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mine them all with the despatch that would be suitable to the parties interested,' and that 'to remedy this state of things, and in the interest of the administration of justice, it had become necessary, so as to permit of the judges of the Superior Court attending exclusively to the affairs more immediately connected with that Court, to abolish the holding of the Circuit Court in the district of Montreal, and to establish there a District Magistrates' Court, before which all the cases, proceedings, matters, and things' then 'within the jurisdiction of such Circuit Court' might 'be brought.'

Synopsis of the Act.

"After these recitals the disallowed Act made the following, among other, provisions:—

"1. That the Lieutenant-Governor in Council might, 'by proclamation, abolish the Circuit Court sitting in the district of Montreal, and establish in the city of Montreal, for the said district, a special Court of Record under the name of "District Magistrates' Court of Montreal."'

"2. That such Court should 'be composed of two justices, called "District Magistrates of Montreal," who should be 'advocates of ten years' practice, be chosen from among the members of the Bar of the province, and be appointed under the Great Seal by the Lieutenant-Governor in Council.'

"3. That no property qualification should be necessary to the magistrates, but that they should be ineligible to be senators or members of the House of Commons, Executive Council, Legislative Council, or Legislative Assembly of the province, or for 'any other office under the Crown.'

"4. 'That such magistrates should hold office during good behaviour,' and be irremovable, 'except

on the joint address of the Legislative Council and Assembly.' Prop. 8-9

"5. That the magistrates should receive a salary of three thousand dollars per annum each.

"6. That all the powers possessed, at the time of the passing of the Act, 'by the judges of the Superior Court, and the duties imposed on them respecting the affairs . . within the jurisdiction of the Circuit Court sitting in the district of Montreal,' should be imposed and conferred upon the district magistrates of Montreal. Synopsis o the Act.

"7. That the jurisdiction of the District Magistrates' Court should be the same, *mutatis mutandis*, for civil matters as that which had been exercised by the Circuit Courts of the district of Montreal.

"8. That all the provisions of the Code of Civil Procedure, and other provisions respecting the Circuit Court of the said district, should, *mutatis mutandis*, be applicable to the Magistrates' Court thereby established.

"9. That the words 'Circuit Court of the District of Montreal,' 'Circuit Court of Montreal,' 'Court,' and 'Circuit Court,' whenever referring to the Circuit Court sitting in the district of Montreal, wherever found in the Code of Civil Procedure, or in any other law, should mean and include the District Magistrates' Court of Montreal. Also that the words 'judge of the Superior Court,' 'judge,' or 'judges,' whenever referring to their powers and duties respecting matters connected with the Circuit Court sitting in that district, should mean the district magistrates of Montreal.

"This Act was disallowed on the 7th day of September, 1888, for reasons which were then com-

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municated to His Honour the Lieutenant-Governor of Quebec, the principal of which were that the provisions which professed to confer upon the Lieutenant-Governor in Council the power to appoint these judges, and which professed to regulate their tenure of office, their qualifications for office, and their mode of removal from office, were in excess of the powers conferred on provincial legislatures by the British North America Act, and were an invasion of the powers conferred upon the Governor-General and the parliament of Canada by that Act.

Provisions of the B.N.A. Act.

"Among other powers conferred by the British North America Act on provincial legislatures is (section 92, sub-section 14) the making of laws in relation to 'The administration of justice in the province, including the constitution, maintenance,

No. 14 of sect. 92.

and organization of provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts.' In no other provision is any power conferred on the legislatures of the provinces in respect of Courts or judges, or the appointment and qualification of judges.

"All other powers than those expressly enumerated by section 92, as conferred on the provincial legislatures, are conferred on the parliament of Canada; and by section 96 it is, besides, expressly provided that the Governor-General shall appoint

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the judges of the Superior, District, and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick. The royal instructions convey to your Excellency the power to appoint some inferior judicial officers.

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"By section 97 it is enacted that 'until the laws relative to property and civil rights in Ontario,

Nova Scotia, and New Brunswick, and the procedure of the Courts in those provinces, are made uniform, the judges of the Courts of those provinces, appointed by the Governor-General, shall be selected from the respective Bars of those provinces.' Prop. 8-9

"By section 98 'the judges of the Courts of Quebec shall be selected from the Bar of that province.' Sect. 98.

"By section 99 'the judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General, on the address of the Senate and House of Commons.' Sect. 99.

"By section 100 'the salaries, allowances, and pensions of the judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the judges thereof are, for the time being, paid by salary, shall be fixed and provided by the parliament of Canada.' Sect. 100.

History of the Circuit Court in Quebec.

"At the time of the passage of the British North America Act, and ever since, the Circuit Court has been a Court of Record in the province of Quebec, held every year in certain districts, including the district of Montreal. It had jurisdiction up to $200. All powers vested in the Superior Court, or the judges thereof, as to various kinds of procedure, were vested in the Circuit Court, and the judges by whom the same was held. As to certain proceedings, the Circuit Court was entrusted with concurrent jurisdiction with the Superior Court.

"The Circuit Court was held by one of the judges of the Superior Court.

"The Circuit Court was, therefore, at the time of the Union, in one sense, a branch of the Superior

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Court. The powers and duties of Superior Court judges included the powers and duties of Circuit Court judges. When the Governor-General appointed a judge of the Superior Court under section 96 of the British North America Act, the appointment carried with it an appointment as Circuit Court judge.

Circuit Court judges.

"The judges of the Circuit Court were, therefore, among the judges who, under section 96, were to be appointed by the Governor-General. They were among the judges whose qualification was prescribed by section 98, as being simply membership of the Bar of the province.

"The Circuit Court judges, inasmuch as they were Superior Court judges, had their tenure of office prescribed by section 99. They were to hold office during good behaviour, and were to be removable by the Governor-General on the joint address of the Senate and House of Commons. They were among the judges whose salaries, under section 100, were fixed and provided by the parliament of Canada.

"The disallowed Act not only empowered the Lieutenant-Governor in Council, as before stated, to abolish the Circuit Court, but to appoint, instead of judges of the Superior Court, *quoad* the Circuit Court, officers who would be, in every sense, judges, in relation to matters within the jurisdiction of the Circuit Court, as fully as the judges of the Superior Court had been, although bearing the name of district magistrates.

"As to judges of the Circuit Court, therefore, the appointing power was taken from the hands of your Excellency and transferred to the Lieutenant-Governor in Council of Quebec.

"The prohibition against the new judges sitting in the Senate and House of Commons is so obviously beyond provincial powers that it would seem impossible that the legislature of Quebec really designed, by the third section of the disallowed Act, to declare that the district magistrates should be ineligible to be senators and members of the House of Commons. It is easier to believe that the intention was that the new judges should lose their offices if they became members of Parliament, although such meaning failed to find expression. Prop. 8-9

Prohibition against the judges sitting in the Senate and House of Commons, is obviously *ultra vires* provincial legislature.

"The provisions of section 4 of the disallowed Act, in so far as the tenure of office was made to depend on good behaviour, is the same as section 99 of the British North America Act; but while section 99 of the British North America Act had the effect of making the judges of the Circuit Court removable by your Excellency, on the address of the Senate and House of Commons, section 4 of the disallowed Act declared that they could not be removed from office except on the address of the Legislative Council and Legislative Assembly of Quebec.

Other *ultra vires* provisions of the disallowed Act.

"Section 5 of the disallowed Act fixed the salaries and emoluments of the new judges and made them payable out of the Consolidated Revenue Fund of Quebec, although section 100 of the British North America Act declared that those salaries and emoluments should be fixed and provided by the parliament of Canada.

"At the time of the passing of the disallowed Act, the judges appointed by your Excellency's predecessors, under section 96 of the British North America Act, were sitting in the Circuit Court;—section 6 of the disallowed Act professed to strip them of all

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their powers, relieve them of all their duties, and impose both powers and duties on the newly-created magistrates, who, in the opinion of the undersigned, if the Act was valid, by necessary implication were made judges, although called magistrates, and although appointed by the Lieutenant-Governor.

Ultra vires provisions of the disallowed Act.

"The legislature of Quebec, however, did not suffer the matter to rest upon implication, but in one of the concluding sections of the Act under consideration declared the words 'judges of the Superior Court,' 'judge,' and 'judges,' wherever used in reference to the Circuit Court, should mean the district magistrates of Montreal attempted to be created by that Act.

"If such powers can be exercised by a provincial legislature, it is difficult to see what is to prevent the legislature from asserting the power to appoint judges of all the provincial Courts and regulate their qualifications for office, their salaries, and their tenure of office.

"The change of name is so easy of accomplishment as not to present any difficulty, especially as the device just described made the terms 'judge' and 'magistrate' interchangeable.

"The undersigned deems it unnecessary to advert at any length, in this place, to the provisions of the disallowed Act abolishing the Circuit Court, as affecting its constitutionality.

"Reference to that point would seem wholly unnecessary, excepting for the assumption indicated in the Order in Council under consideration, that every kind of provincial legislation which has not been distinctly questioned is admitted to be correct; and but for the fact that the power to abolish is stated by the Order in Council to have been 'not

even questioned by the Minister of Justice.' In passing, it may therefore be proper to say that instances may perhaps be suggested in which the power of your Excellency and of Parliament to remove judges might be usurped by provincial legislatures in the exercise of their authority as to the constitution and organization of the Courts. Cases may be suggested in which in the exercise of this power a Court might be abolished for the purpose of removing one or more judges, and, no doubt, in such a case, the control of the Federal authority would be called for, and the power of disallowance would be exercised. Prop. 8-9

Possible assumption by provincial legislatures of power to remove judges by abolishing Courts.

"In the consideration of the Act which is at present the subject of discussion, it has been assumed by the undersigned, and is still assumed, that the abolition of the Circuit Court was not for the purpose of usurping the power of removing judges, but was done to accomplish the setting up of a new tribunal. He does not, therefore, deem it necessary to place undue stress on the fact that the disallowed statute had the effect of abolishing the Circuit Court.

"It seems necessary, however, to call attention to the important misconception, which seems to prevail throughout the reasoning presented by the Order in Council of the Quebec government, that the allowance of provincial legislation is, in all cases, an admission of the validity of such legislation, and an admission which has the effect of depriving the Federal authority of the right or power of disallowing statutes similar to those which have been permitted to go into operation.

Non-exercise of the veto power does not imply an admission of the validity of provincial legislation.

"No such inference can properly be drawn. It is apparent to any person conversant with the subject

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that many provincial statutes which have been left to their operation contained provisions beyond the powers of the provincial legislatures, and that many others which have been left to their operation contained provisions of very doubtful validity.[1]

To exercise it was at first a more delicate task than now.

"The reasons for this are not difficult to find. In the early history of Confederation, the provincial legislatures were naturally inclined to follow the lines of legislation which had for so many years been pursued in the parliament of the provinces. The provisions of the British North America Act were novel. Its operation had not been illustrated by the precedents which have since marked out with greater distinctness the difference between the authority of Parliament and the authority of the legislatures, and in the early years of the Union interference with provincial legislation was perhaps a more delicate task than it should be considered now, when the relative positions of the legislatures and Parliament are better understood, and the principles which should guide both have become more familiar.

Provincial attempts to prescribe the qualifications of judges

"The most remarkable instance in which provincial legislation has overrun the limits of provincial competence has been the legislation in reference to the administration of justice. It has been common for the provinces to enact from time to time what the qualifications of the judges who were to be appointed by the Governor-General should be, although this seems to the undersigned to be an attempt to control, by provincial legislation, the power vested in the Governor-General by the British North America Act.

[1] As to this, see, also, the notes to Proposition 10.

"The most plausible argument offered in defence of such legislation has been the contention set up in one quarter that, inasmuch as it is for the provincial legislatures to say whether the Court shall be constituted or not, it is proper for them to say that the Court shall be constituted, provided judges of certain qualifications are appointed to preside therein. This seems to the undersigned to be erroneous in principle. It is an attempt to provide that the power of the Governor-General shall be exercised only *sub modo*, and if the principle were recognized it would be competent to provide that provincial Courts should only be established, provided the judges should be those nominated by the provincial Executive, or taken from a class nominated by that Executive.

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Are improper.

"Again, in reference to this subject, doubtful legislation has been adopted in nearly all the provinces, setting up Courts with civil and criminal jurisdiction, with judges appointed by provincial or municipal authority. In some instances, and with respect to some of these tribunals, it would seem that the doubts as to their constitutionality have been lessened or removed by the Dominion parliament from time to time recognizing them or conferring jurisdiction upon them. As regards others of them, the legislation may still be open to grave question, although in most cases, as in the case of Quebec, now under consideration, the legislatures have been careful to avoid conferring the title of 'judges' upon the officers whom they have really undertaken to clothe with judicial powers.

Provincial legislation for appointment of judges of civil and criminal Courts,

"In legislating upon this subject, the enactments have followed a course which it has been difficult to control without seeming to infringe unnecessarily

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on provincial action, and without seeming, at least, to impugn a series of provincial statutes which have frequently been left to their operation.

"In other instances the promoters of this kind of legislation have been disposed to assume that the organization of a tribunal with small civil and criminal jurisdiction, presided over by a judge or magistrate appointed by the provincial Executive, would be within provincial authority, and that such a tribunal, having been established, its authority and jurisdiction could be widened and increased under the powers which the provincial legislatures possess to regulate the administration of justice in the province, 'including the constitution, maintenance, and organization of provincial Courts, both of criminal and civil jurisdiction, and including procedure in civil matters in those Courts.'

And increasing by degrees the jurisdiction of such Courts.

"A reference which will presently be made to reports of preceding Ministers of Justice on this and kindred subjects will show how necessary it seemed to the predecessors of the undersigned in times past to prevent encroachments by this means upon the appointing power of the federal Executive, and how necessary it was deemed to prevent the confusion and injustice which must ensue when a tribunal, to which suitors have resorted for justice, has been deciding upon the rights of parties without having had jurisdiction.

Examples of such provincial legislation.

"The Order in Council under review, in presenting to your Excellency what is claimed to have been the law respecting district magistrates in the province of Quebec before the passage of the disallowed Act, refers to a series of enactments which are not unlike the class of statutes which has last been adverted to.

"In the year 1869 the legislature of Quebec, by chapter 23 of that year, declared that the Lieutenant-Governor in Council might appoint one or more persons to be district magistrates, with the power of justices of the peace and judges of sessions of the peace. Their salary was not to exceed $1,200, and their civil jurisdiction was limited to $25, excepting as to tithes, taxes, penalties, and damages recoverable under the Lower Canada Municipal Act, and under certain other Acts of Quebec. In these enumerated cases their jurisdiction was unlimited, provided the defendant resided within the county in which the Court was held, or that the debt was contracted therein and the defendant resided within the district.

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Quebec

District Magistrates' Act, 1869,

"The same Act purported to confer power on the Lieutenant-Governor in Council to establish additional magistrates in the district of Saguenay, with jurisdiction up to $200. This Act may be contended to have had validity as applying altogether to a provincial Court of lower rank than any of the Courts in respect of which the appointing power has been given to the Governor-General in Council by the British North America Act; or it may possibly be sustained on other grounds, which it is unnecessary to seek for at present. It cannot be supposed, however, to have had validity from the fact that it was left to its operation by the federal Executive, although this is almost the sole ground on which its validity is assumed in the Order in Council under review. No argument can be drawn from this statute as to the validity of the disallowed Act, because the Act of 1888 differed from it in essential points, some of which have already been enumerated and may be referred to hereafter. The Act of 1869, however, contains provisions which clearly illustrate

Was possibly *intra vires*.

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the remarks before made as to the disposition to encroach upon the powers of the federal Parliament and Executive in regard to the administration of justice. Some of its provisions would hardly be repeated by the legislature now, in the light which has been thrown upon our constitution by twenty years of experience. Such, for example, are the provisions of the 9th section, which conferred on each of the magistrates powers which the parliament of Canada had declared should be exercised only by two justices of the peace, or by certain other specified officers, the district magistrate not being one; and section 10, which undertook to extend to district magistrates the provisions of an Act of the parliament of Canada respecting justices of the peace; also section 28, which appropriated the moneys received from penalties, forfeitures, and fines imposed by a district magistrate in such manner and at such times as the Lieutenant-Governor might direct, although the greater portion of those fines and penalties would, according to the Act, be recoverable under Dominion statute and belong to the Dominion of Canada.

But it illustrates the tendency to encroach on Dominion powers.

Amending Act of 1870.

"In the next year, by chapter 11 of 1870, assented to 1st of February, 1870, an attempt was made to withdraw the meaning of the obviously objectionable provisions of the Act just referred to, by adding a section declaring that the Act 'should be construed as intended to apply to such matters only as' were 'within the exclusive control of the legislature' of the province, etc. Under ordinary circumstances, such a provision would be unnecessary.[1] It is obvious that no provincial statute can be construed as extending to anything outside of provin-

[1] As to the use of such precautionary phrases in provincial Acts, see the notes to Proposition 32, *infra*.

cial powers, but the adoption of the section is somewhat significant, and leads to the belief that some of the provisions already referred to were pointed out, between the sessions of 1869 and 1870, as being objectionable. Prop. 8-9

"In the following year, by chapter 9 of 1871, assented to December 23rd, 1871, the limit of civil jurisdiction was raised from $25 to $50. Jurisdiction was given to the district magistrates in certain cases 'to annul or to rescind a lease,' and to award 'damages for breach of the stipulation of the lease.' Power was given also to award costs on the tariff of the Circuit Court, and to sell immovables for sums exceeding $40, according to the practice of the Circuit Court. Amending Act of 1871.

"Thus the Court having been established, with a magistrate appointed by provincial authority, the process of expanding its jurisdiction began.

"It went on in the year 1874, when by chapter 8, assented to January 28th, 1874, it was again enacted with great particularity, that every district magistrate should have the power vested in one or more justices of the peace and of a judge of sessions, and that such magistrate should 'exercise all such functions proper to a district magistrate, as required or authorized by any Act or Acts of the province of Quebec, or by any law whatever,' and should 'act in any case or matter, and in any or every manner authorized or required by law.' By three of the sections of the same Act the provisions of several statutes of the parliament of Canada (which, of course, could only be extended by the parliament of Canada) were extended, for the purpose of making the meaning of the legislature clear to confer on those officers the powers which Parliament had conferred on other officers. Amending Act of 1874.

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"The fines and penalties recoverable before the magistrates were again dealt with as belonging to the province, and the tenure of office was established by the provision that removal from office should not be made without the reason being assigned in an Order in Council.

"In the following year, by chapter 31 of 1875, assented to December 24th, 1875, there is a declaration that the Act of 1874 had not enlarged the jurisdiction of the District Magistrates' Courts.

Amending Act of 1876.

"In the following year, by chapter 12 of 1876, assented to December 28th, 1876, the jurisdiction was altered in such a way that residence within the district was not necessary to jurisdiction in some of the exceptional cases where the jurisdiction had not been limited by the Act of 1869, and it was declared sufficient that the defendant should live in the province.

Amending Act of 1885.

"By chapter 15 of 1885, assented to May 9th, 1885, in the county of Gaspé and part of the county of Saguenay, the civil jurisdiction was raised to $99.

"The extent to which this Court possesses jurisdiction in respect of specially enumerated cases may be seen from the fact that in the suit of The Corporation of St. Guillaume *v.* The Corporation of Drummond, in 1876, (reported on appeal in 7 R.L. 562), judgment was rendered for municipal taxes by the district magistrate (appointed by the Lieutenant-Governor in Council) for $1,880.

The disallowed Act of 1888.

"Finally, by the disallowed Act, the 'District Magistrates' Court,' in so far as the district of Montreal was concerned (and this includes the city of Montreal and eight counties besides), having matured its growth by being made a Court of Record with such extensive powers, with its judges holding

office during good behaviour, and removable only on the joint address of the Legislative Council and Assembly, with the salaries of its judges raised to $3,000, all the powers and jurisdiction of the judges of the Superior Court in respect of the Circuit Court having been conferred upon these magistrates, the new tribunal, which had been eighteen years in reaching maturity, was ready to take the place of the Circuit Court. The Circuit Court was then abolished in the district of Montreal, and the places of its judges, commissioned by the Governor-General, were taken possession of by the district magistrates. Prop. 8-9

The disallowed Act of 1888.

"The veil was still to be kept up over the title of the judicial officer, and had 'district magistrate' inscribed upon it, but it was provided that this should have no legal effect by the enactment that, although 'district magistrate' might not mean 'judge,' the word 'judge,' appearing everywhere, should mean 'district magistrate,' in relation to the Circuit Court affairs and jurisdiction.

"It seems to the undersigned evident:

"(1) That the government of the province of Quebec are not warranted in assuming that because this series of enactments, in reference to District Magistrates' Courts, was permitted to go on without disallowance, the statutes are therefore *intra vires* of the legislature of Quebec.[1]

Non-exercise or veto power does not make a provincial Act *intra vires*.

"(2) That if, by a gradual increase of jurisdiction, a new Court can be substituted for the Circuit Court, the legislature would have the right, in the same way, to go on extending the jurisdiction until the Court should be sufficiently equipped to take the place of the Superior Court, and that by the same

Legislation gradually increasing jurisdiction to that of a Superior Court

[1] See Proposition 11 and the notes thereto.

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process the Executive of the province could obtain control of every Court in the province, the same device, if necessary, being used to conceal the word 'judge.'

Should be disallowed even if *intra vires*.

"(3) That even if this mode of proceeding by the provincial legislature be not *ultra vires*, it should be controlled by the power of disallowance vested in your Excellency, because it eventually results in a transference of the judge-appointing power from the Dominion to the provincial Executive.

"The undersigned, therefore, cannot agree with the statement contained in the Order in Council under consideration that, because this series of enactments was made by the province of Quebec, 'it is therefore evident that before the sanction of the statute in question the Lieutenant-Governor had, and that he will have, after the coming into force of the disallowance, the power to appoint district magistrates and to establish magistrates' Courts in every county,' etc., 'with the civil jurisdiction already mentioned,' and that 'in declaring the power of appointing judges *ultra vires* the Dominion authorities deny to the Executive of this province a power it possesses and has exercised since 1869, that it possesses and exercises actually, and will continue to possess and exercise in the future, by virtue of the laws anterior to the disallowed statute.'

Previous reports of Ministers of Justice.

"To show that the view hereinbefore expressed is not a novel view to take of such enactments, and to show likewise that the government of the province of Quebec is not justified in assuming that the federal Executive admits the validity of all Acts which it leaves to their operation, and loses the power of disallowance over similar statutes thereby,

the following references may be made to some of the reports which have been presented by the predecessors of the undersigned on provincial legislation of this character[1]:— Prop. 8-9

"A statute of Ontario, assented to January 23rd, 1869, chapter 22, made provision that the judges of the County Courts of Ontario should hold their office during pleasure, and should be subject to be removed by the Lieutenant-Governor for inability, incapacity, or misbehaviour, and was specially reported on by the Honourable Sir John Macdonald, then Minister of Justice, and, being referred at his suggestion to the law officers of the Crown in England, the latter on the 4th May, 1869, reported that it was not competent for the legislature of the province of Ontario to pass the Act.[2] The report was signed by Sir Robert Collier and the present Lord Chief Justice of England. It would seem that the legislature of Ontario had acted in pursuance of the theory that its power to make laws in relation to the administration of justice in the province, 'including the constitution, maintenance, and organization of provincial Courts,' involved the power to limit the tenure of office and to constitute the Court with a proviso, in effect, that the appointing power of the Governor-General should be exercised *sub modo*.

Ontario Act of 1869 respecting tenure of County Court judges.

Law officers of the Crown in England.

Provinces cannot control Governor-General's appointment of judges.

"The Minister of Justice of that day, and the law officers of the Crown in England, maintained that that could not be done.

"On January 19th, 1870, the same Minister of Justice reported in favour of the disallowance of

Disallowance of Act supplementing judges' salaries.

[1] All the reports referred to are to be found in Hodgins' Prov. Legisl.

[2] See Hodgins' Prov. Legisl., Vol. I., p. 50.

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the Supply Bill of the province of Ontario, because it supplemented the salaries of certain of the judges of that province, and the Act was disallowed accordingly.

"On the 14th of April, 1873, the same Minister of Justice took exception to an Act of Manitoba, imposing a fine upon judges for neglecting to perform any duty, and recommended that the attention of the legislature of Manitoba be called to the objectionable enactment. In the same report it is recommended that the government of Manitoba should be given to understand that the Governor-General did not consent to the limitation of his power of selection of judges, contained in the Act of Manitoba, which pretended to define the qualification of the persons who should be appointed to the bench. The government of Manitoba was informed that the Governor-General would not feel bound by that Act in any appointments to the bench. In approving that report the Governor-General added in his own hand the words:—'I conclude that the recommendation to be conveyed to the Lieutenant-Governor is a sufficient security for the amendment of these Acts.'

Manitoba legislation as to judges.

"On the 2nd of September, 1874, the Hon. Mr. Justice Fournier, then Minister of Justice, commented on an Act of the province of New Brunswick, chapter 29 of 1873, as being, in fact, an appointment by local authority of a judge. Correspondence led to the amendment of that Act in accordance with his view. On the 18th of November, 1874, the same Minister of Justice reported that the provisions of an Act of the legislature of Ontario, with respect to the qualifications to be possessed by certain judges, were *ultra vires*, as placing a limit on the discretion of the Governor-

Mr. Fournier.

Similar Ontario legislation.

General which was not to be found in the British North America Act, and he declared that such a provision was ineffectual, and that the Governor-General would not be bound by it. Prop. 8-9

"On the 9th of March, 1875, the same Minister of Justice recommended the disallowance of a statute of British Columbia, because, after the appointment of County Court judges in particular districts, the statute reported on empowered the Lieutenant-Governor to appoint the places at which the County Court judges should reside from time to time, the Minister declaring that this was practically assuming the power of the appointment of judges, and the Act was disallowed accordingly. British Columbia legislation as to residence of judges.

"On the 13th of October, 1875, the Hon. Edward Blake, then Minister of Justice, reported against a similar statute of the same province. He said that the 'consequence of permitting the Act now under consideration to go into operation would be to permit the Lieutenant-Governor in Council to arrange the boundaries of these districts and to alter them at his pleasure, and so, practically, to determine, at his pleasure, the places within which the County Court judges should have jurisdiction.' Mr. Edward Blake.

"He contended that such an enactment was objectionable, 'as the alterations thereby authorized might practically result in the appointment, by the local government, of a County Court judge to a new district or judgeship, thus transferring to the local government a part of the power of appointment vested in this government under the constitution,' and he added, 'so long as the local legislature keeps within its own hands the division of the districts, and the alteration of their boundaries, this government has, by virtue of the power of disallowance, His objections to such legislation.

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some measure of control over such action; but should this Act go into operation, no such control could thereafter be exercised here.'

Mr. R. Laflamme.

"On September 29th, 1877, the Honourable R. Laflamme, then Minister of Justice, called attention to various Acts of British Columbia, relating 'to the Gold Commissioner, and his powers as judge of the Mining Court, and to the danger of allowing legislation which increases, from time to time, the jurisdiction of the Court, the judge of which has not been appointed by the Governor-General.'

British Columbia legislation as to Gold Commissioners and Mining Courts.

'He proceeded to relate the various Acts by which the jurisdiction was gradually accumulated, until, in the opinion of the Minister, the Court had, at length, become, by five successive enactments, a Court within the meaning of the 96th section of the British North America Act.

"He thought it was not 'necessary, in order to bring a Court under the provisions of this section, that it should be called by the particular name of 'Superior,' 'District,' or 'County Court,' and, although he did not recommend the disallowance of the statute, he recommended its repeal or amendment by the provincial authorities, and expressed this view:—'It will be readily seen how easy it would be for the local legislature, by gradually extending the jurisdiction of these Mining Courts, and by curtailing the jurisdiction of the County Courts, or Supreme Court, as now established, to bring within their own reach, not only the administration of justice in the province, but also, practically, the appointment of the judges of the Courts in which justice is administered.'

"On the 3rd of October, 1877, the same Minister reported against an enactment of the province of

Ontario to provide that the stipendiary magistrate of the territorial districts of Muskoka, Parry Sound, and Thunder Bay should act as a Division Court judge, with like jurisdiction and powers as were possessed by County Court judges in Division Courts in the counties, as being in conflict with the 96th section of the British North America Act. Prop. 8-9

Ontario Act as to stipendiary magistrates.

"He refrained from recommending disallowance of the Act, as Acts previously passed by the provincial legislature, conferring certain judicial powers in civil matters on stipendiary magistrates, in relation to Division Courts in Ontario, had been left to their operation, and those powers had not been substantially extended by the Act then under his review, but he pointed out that the same danger which had received his notice, in the case of British Columbia, might ensue from this class of legislation.

Division Courts in Ontario.

"The jurisdiction of the Court which he had referred to only reached $100, excepting when the consent of parties was given for the disposal of cases of larger amounts. He took special exception, however, to the provision that all enactments from time to time in force in Ontario, relating to Division Courts in counties, should apply to the Division Courts of these districts, stating that while it might be 'quite within the legislature of Ontario to increase the jurisdiction of the Division Courts in counties, as such Courts are now presided over by judges appointed by the Dominion,' the attempt to exercise that power in relation to Division Courts, presided over by judges appointed by Ontario, would be objectionable, and he intimated that the Act would be disallowed unless amended. The same objection was conveyed in a report of the same Minister in reference to New Brunswick legislation on December 22nd, 1877.

Increasing jurisdiction of inferior Courts.

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Mr. McDonald.

"On June 14th, 1879, Chief Justice McDonald, then Minister of Justice, took exception to an Act of Prince Edward Island, which allowed a small fee for costs taxed by the County Court judge, as being a breach of the provisions of the British North America Act in relation to the emoluments of judges.

"On January 20th, 1880, the same Minister called attention to an Act of Ontario, in amendment of a similar Act to that relating to the territorial districts of Muskoka, Parry Sound, and Thunder Bay. This Act gave the appointment of the judge to the Lieutenant-Governor, fixed the salary, and enlarged the civil jurisdiction, but was not different in principle from the statute which had been commented on in 1877. This Act was disallowed.

Sir Alexander Campbell.

The Ontario Judicature Act.

"On January 30th, 1882, Sir Alexander Campbell, then Minister of Justice, reported that an Act of Ontario, (chapter 5, 1881), consolidating the Superior Courts, and establishing a uniform system of pleading, practice, etc., contained provisions which appeared to be *ultra vires*, as being in effect an assumption of the appointing power by the provincial legislature, and he caused commissions to be issued to the judges, on the reorganization of these Courts, in order to place their authority beyond question.

"In the same report he took exception to a provision to constitute the judges of County Courts official referees and local masters.[1]

[1]Sir A. Campbell's words are:—"The undersigned thinks it doubtful whether the provincial legislature can constitutionally in this manner appoint judges, who hold office by commissions from your Excellency, to other offices under the provincial government. The expediency of allowing county judges to act as referees and local

"On May 8th, 1883, the same Minister called attention to the legislation of the province of British Columbia, conferring jurisdiction on Gold Commissioners appointed by the Lieutenant-Governor of British Columbia, and the Act was disallowed. Prop. 8-9

"In a report of April 13th, 1887, the undersigned felt himself obliged to state that the provision of a Manitoba statute, to the effect that for certain misconduct the County Court judge should forfeit his office, was *ultra vires* of the provincial legislature.

"The contention is, however, made, in the Order in Council under review, that the Court of Appeal of the province of Quebec has recognized, as constitutional and *intra vires*, in two cases, the legislation for the appointment of such district magistrates. Decisions of the Courts.

"One of the supposed cases referred to is that of The Corporation of St. Guillaume *v.* The Corporation of Drummond, 7 R.L. 562. It seems remarkable to the undersigned that reference should have been made to this case for this purpose, especially by the emphatic statement that the judgment of the judge of first instance was unanimously confirmed in the Court of Appeal by Judges Tessier, Monk, Sanborn, and Ramsay. The most careful scrutiny of this case fails to detect anything to bear out the statement that in that judgment the enactment for the appointment of the district magistrates was 'recognized as constitutional and *intra vires*.' A judgment had been rendered by Mr. Justice Plamondon for $1,880. An appeal was asserted, Corporation of St. Guillaume *v.* Corporation of Drummond.

Masters is questionable, and the same may at some future time require the consideration of Parliament. Should Parliament think proper to legislate upon the subject, it is evident that the provisions last referred to of the Act now under consideration would become inoperative:" Hodgins' Prov. Legisl., Vol. 1, p. 196. See, however, Proposition 45, and the notes thereto.

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(1) on the ground that the judge was himself liable to contribute to the defendant corporation towards any amount for which judgment might be given, and that he had been recused; and (2) that the amount claimed was above the jurisdiction of the Court.

"The judgment on the appeal was delivered by Sanborn, J., on these two points only, and the question of *intra vires*, or constitutionality of the legislation, was not raised, considered, or even referred to.

Reg. *v.* Horner.

"The second case on which reliance is placed is that of Regina *v.* Horner, in 1876, 2 Cart. 317,[1] and the brief judgment delivered throws no light upon the question. The Court (per Ramsay, J.), while admitting that difficulties might exist 'as to the conflict of the powers as an abstract question,' held the difficulty was practically disposed of by the case of Regina *v.* Coote, L.R. 4 P.C. 599. The Court (per Ramsay, J.) stated:—'The case of Coote, decided in the Privy Council, directly recognizes the powers of the local legislatures to create new Courts for the execution of criminal law, as also the power to nominate magistrates to sit in such Courts. We have, therefore, the highest authority for holding that, generally, the appointment of magistrates is within the powers of the local Executives. So much being established, almost all difficulty disappears.' Turning now to the case of Regina *v.* Coote, which the Quebec Court of Queen's Bench had relied on as solving all difficulties as to the conflict of powers, it is matter of regret to find that it really has no bearing on that subject whatever. The single passage in that judgment which bears upon any constitutional question is contained in the

Reg. *v.* Coote in the Privy Council.

[1] 2 Steph. Dig 450, (1876). See *supra* pp. 123, 127-8.

following extract from the judgment delivered by Sir Robert Collier :—'The objection taken at the trial appears to have been that to constitute such a Court as that of the Fire Marshal was beyond the power of the provincial legislature, and that, consequently, the depositions were illegally taken. Subsequently other objections were taken in arrest of judgment, and the question of the admissibility of the depositions was reserved. It was held by the whole Court, (in their lordships' opinion, rightly), that the constitution of the Court of the Fire Marshal, with the powers given to it, was within the competency of the provincial legislature.' Prop. 8-9

"There was no contention at the argument, and no decision by the Court, as was supposed by Mr. Justice Ramsay, that the 'power to nominate magistrates to sit in such Courts is within the power of the local Executives.' No solution, therefore, of the difficulty noticed by the Court of Queen's Bench in the case of Regina *v.* Horner is to be found in the decision of the Privy Council in Regina *v.* Coote. Reg. *v.* Coote in the Privy Council.

"The fact is that the statute then under review created officers called 'Fire Marshals,' with the power of making investigations concerning fires, and their power, in so far as it came under the consideration of the Judicial Committee, was merely that of summoning witnesses and of committing suspected persons for trial. How, then, could it have been supposed that this was a decision even in favour of the principle that local legislatures could 'create new Courts for the execution of the criminal law,' as stated by Mr. Justice Ramsay, much less a decision affirming 'the power' of the local authorities to 'appoint the judges to sit in such Courts'?

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The power 'to create new Courts for the execution of the criminal law' was expressly conferred by the British North America Act, and, fortunately, it does not rest on the case of Regina *v.* Coote. As to the suggestion that the local legislature had even attempted, by the Act then under consideration, to create a new 'Court for the execution of the criminal law,' it is not only apparent from the references of the Judicial Committee that no such attempt had been made, but the Court of Queen's Bench itself had decided, in 1872, (*Ex parte* Dixon, 2 Revue Critique 231), that the statute in question had no connection with criminal procedure.

Reg. *v.* Horner.

"The only remaining passages in the judgment of Regina *v.* Horner are an attempt to work out the theory on which it was imagined that the case of Regina *v.* Coote had been decided, and the case altogether may be considered as far from a conclusive authority, without disrespect for the eminent tribunal which pronounced the decision. The decision, whatever its value, only had in view the District Magistrates' Court as it existed in 1876.

Legislation in provinces other than Quebec.

"Having put forward these two cases as the only ones which could be relied on as judicial confirmation of any Act of the character of that which has been disallowed, the Order in Council proceeds to set up the contention that similar laws are in force in all the provinces of the Dominion. If that contention were correct, in point of fact, it would hardly have much bearing on the question of constitutionality. But it is not correct. One instance given in the Order in Council is a statute of the province of New Brunswick, which provides for the establishment of 'Parish Courts,' with civil jurisdiction up to $40. This New Brunswick statute, it

New Brunswick Parish Courts.

must be admitted, is similar to a number of other provincial statutes, but it differs in all the points to which importance has been given in the previous parts of this report, from the disallowed statute. Prop. 8-9

"Reference is made in the Order in Council under review to a decision of the Supreme Court of New Brunswick, in the case of Ganong *v.* Bayley, 1 P. & B. 324,[1] as sustaining the 'Parish Courts' Act. Ganong *v.* Bayley.

"The undersigned desires not to be understood as undertaking to discuss here the legality of statutes like the New Brunswick statute just referred to. The wide difference which has been already pointed out between those statutes and the disallowed Act, as to criminal jurisdiction, as to the extent of the civil jurisdiction, and as to the attempt to transfer certain of the powers of the Superior Court judges to provincially appointed judges, makes it unnecessary to enter upon such a discussion, but it may be proper that he should notice the New Brunswick decision just mentioned, because it may be supposed that, although the statutes were different, the principles affirmed by the Court may have been sufficiently wide to cover the disallowed statute, as well as the statute of New Brunswick, which was then being considered.

"The question before the Court was whether the New Brunswick Act, (39 Vict., chap. 5), intituled, 'An Act to establish Parish Courts,' was *ultra vires* of the local legislature, as to the section which provided that the commissioners (who are the judges in those Courts) should be appointed by the Lieutenant-Governor in Council. As already

[1] See *supra* p. 136.

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stated, the Parish Court was a Court for the recovery of debts under $40. Two of the judges of the Supreme Court of New Brunswick, out of five, denied the validity of the enactment. Two of the judges who affirmed the validity of the enactment did so on the ground that all the powers of the provincial legislature and Executive which existed before the Union of the provinces remained to the provincial legislature and Executive after the Union, except in so far as altered by the provisions of the Union Act.

Ganong v. Bayley.

Provincial legislatures have only those powers conferred by the B.N.A. Act.

"This principle, without which there would not have been a majority of the Court to uphold the provision of the Parish Courts Act, would not now be affirmed, since the Judicial Committee of the Privy Council (as well as other tribunals) has so clearly established that no powers are possessed by the provincial legislatures, except such as are conferred by section 92 of the British North America Act, and that all other powers are vested in the parliament of Canada.[1] It may be that such statutes as that regarding the Parish Courts are *intra vires* the provincial legislature, without the disallowed statute being so, but, if they are *intra vires*, it can hardly be from the weight of the New Brunswick decision just quoted, or from the reasoning given by the majority of the Court.

Ontario Act as to stipendiary magistrates.

"Another of the statutes referred to in the Order in Council as being similar to the disallowed Act is one passed by the legislature of Ontario, and which conferred jurisdiction on stipendiary magistrates in territorial and temporary judicial districts.

"The undersigned has, however, already shown that the provisions of this Act were distinctly

[1] See Propositions 1, 2, and 66, and the notes thereto.

excepted to in the report of the Hon. Mr. Laflamme, and that a request was made that it should be repealed before the time for disallowance should expire; that that request was unheeded, and that a subsequent enactment of a like character, but going a little further in conferring jurisdiction, was disallowed. Legislation of that kind has not been continued in Ontario, but the legislature has, in recent years, avoided doubtful ground by establishing the Court merely, and leaving the appointment of the judge to the Dominion Executive. Prop. 8-9

"The Order in Council now under consideration, after presenting the reasoning which has been herein reviewed, with regard to the constitutionality of the disallowed Act, proceeds to give a statement of facts which seems to the undersigned to have no bearing upon that question, and no relevancy to the question of disallowance. It refers to the fact that in 1887 the legislature of Quebec authorized the appointment of two additional judges of the Superior Court, and calls your Excellency's attention to the fact, according to a principle acknowledged by the Dominion authorities, and especially by the Right Honourable the First Minister in a speech in Parliament in 1880, that the wish of the provincial legislature on such a subject should be respected. On this point there need be no controversy. . . . Provincial legislation authorizing the appointment of more Superior Court judges.

"It seems necessary to say, however, that the fact of a provincial legislature having done its part towards enlarging the number of judges, and the circumstance, if such exists, of additional judges being needed, cannot justify the attempt on the part of the provincial legislature to seize the appointing power. Yet such seems to be one of the reasons put forward in justification of the disallowed Act."

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Sir John Thompson then discusses an objection raised in the Quebec Order in Council, that the advice to the Governor-General to disallow the Act of 1888 had been unduly delayed, showing it to be founded on a misconception of facts, and continues:—

"The Quebec Order in Council next proceeds to state a grievance which seems to differ materially from the one just noticed, inasmuch as it is a complaint that in dealing with the disallowed Act your Excellency's advisers acted with too much expedition. Reference is therein made to a memorandum of the Minister of Justice, dated the 9th day of June, 1868, recommending the course which should be pursued in reference to a review of provincial statutes, and the government of Quebec declare that in the recent case of disallowance those rules have not been observed.[1]

Rules laid down in memorandum of 1868 as to disallowance of statutes,

"The only rule to which this complaint can refer, by any possibility, is the following:—

"'That where a measure is considered only partially defective, or where objectionable, as being prejudicial to the general interests of the Dominion, or as clashing with its legislation, communication should be had with the provincial government with respect to such measure, and that in such case the Act should not be disallowed, if the general interests permit such a course, until the local government has had an opportunity of considering and discussing the objections taken, and the local legislature has also an opportunity of remedying the defects found to exist.'

Ex. gr., that objections should be submitted before disallowance,

"The undersigned does not understand that the adoption of those general rules in 1868 in any way

[1] Printed in Hodgins' Prov. Legisl., Vol. 1, p. 1.

limited or controlled the exercise of your Excellency's power of disallowance. They were suggestions for the guidance of the Minister of Justice of that time, and for his successors in office, and, in so far as provincial governments were concerned, they were merely indications of a line of action which your Excellency's advisers at that period thought suitable to be adopted. They were not in any sense an agreement with provincial governments[1], and at any time when they may be departed from, it would seem that the provincial Executives have no reason to complain of the exercise of your Excellency's powers by any other method. In the present instance it seems apparent that the complaint of departure from these rules is hardly well founded. It can hardly be contended that in dealing with the objectionable statute, the provincial Executive was at liberty to proceed with the utmost expedition, but that the federal Executive was bound to pursue a course of remonstrance and delay, which would have led to great confusion and public injury if the view held by the federal Executive was right. It can hardly be contended that if your Excellency's advisers thought the important provisions of the disallowed Act to be unconstitutional, and in excess of the powers of the legislature, they should have allowed the Act to be proclaimed, the judges to be appointed by the Lieutenant-Governor, the Circuit Court to be abolished by proclamation, the new tribunal to exercise its large powers in a great section of the province of Quebec without authority, suitors to be involved in expense, judgments to be rendered and enforced, seizures made, property sold,

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Do not control veto power.

The general interests demanded prompt disallowance of the Quebec Act of 1888.

[1]With regard to this remark of Sir J. Thompson, it would seem clear that Ministers could not bind the Crown by any such agreement. See per Higinbotham, C.J., Attorney-General *v.* Goldsbrough, 15 V. L.R. at p. 645, (1889).

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personal liberty restricted, while your Excellency's advisers would be remonstrating with the provincial Executive, and waiting for the legislative session of 1889, in order to give that legislature 'an opportunity of remedying the defects found to exist.'

"It seems to the undersigned that, quoting the language of the rule which it is claimed was violated, 'the general interests' did not 'permit such a course.'

"Under the circumstances which the undersigned has presented in this report, he ventures to submit that the government of the province of Quebec was under an erroneous impression in supposing that, in disallowing the District Magistrates' Act of 1888, your Excellency's government was actuated by any disposition whatever to limit the actual right of that province 'to adopt any law deemed necessary for the good government and prosperity of the province, within the limits of its powers and attributes.'"

Sir J. Thompson's further report on the Quebec District Magistrates Act, 1888.

In answer to the above report of Sir John Thompson, the Lieutenant-Governor of Quebec forwarded to the Dominion government a report of the President of the Executive Council of the province, upon which the Minister of Justice made a further report on July 15th, 1889, in the course of which he said[1]: —"In the document now under review, the President of the Executive Council states that he does not clearly see from the report of the undersigned, approved on January 22nd last, whether the undersigned maintains the opinion that the local legislatures have no power to create Courts, of no matter how small jurisdiction, whose judges shall be

[1] Through the courtesy of the Department of Justice at Ottawa, the writer has had an opportunity of perusing all reports of Ministers of Justice upon provincial legislation from 1887, when Mr. W. E. Hodgins' wo terminates, to the present time.

appointed by the local Executives. In the previous report of the undersigned, no question was raised as to the provincial power to create such Courts, and as to whether the power might not be validly conferred on the local Executives to appoint magistrates or judges for Courts of small jurisdiction, and different from the Courts mentioned in the clause of the British North America Act, which confers the appointing power on the Governor-General. The undersigned distinctly declared in that report that that was not a matter involved in the discussion, as the legislature of Quebec, in enacting the District Magistrates' Act, and the Quebec government, in making the appointments, had clearly invaded the powers of Parliament and of your Excellency, even though the power to appoint some classes of officers, with judicial functions, might be with the local authority. The contention which is made in the document under review . . does not, in the opinion of the undersigned, refute the view set forth in his previous report . . That view has been taken by nearly all the Ministers of Justice since the union of the provinces, namely, that the words of the British North America Act referring to 'Judges of the Superior, District, and County Courts' include all classes of judges like those designated, and not merely the judges of the particular Courts which at the time of the passage of the British North America Act happened to bear those names."

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Provincial power of appointing some judicial officers not denied.

Sect. 96 of B.N.A. Act.

And, again, in his report as Minister of Justice on the New Brunswick Acts for 1889, Sir John Thompson objected to section 4 of c. 23, an Act respecting Criminal Courts, which provided that the Lieutenant-Governor in Council might appoint stipendiary or police magistrates within any county, saying:— "The undersigned again desires to express his

Prop. 8-9 doubts as to the right of the Lieutenant-Governor to appoint, or of a provincial legislature to authorize the appointment of, justices of the peace or other judicial officers. The question is one of difficulty, and there have been decisions both ways, but no final Court of appeal has expressly formulated a judgment upon it," and referring to a recent case, which is evidently Reg. *v.* Bush, (above referred to at pp. 137-9,) he strongly objects to the argument based in the judgments in that case on the acquiescence of the Dominion parliament.[1]

Sir J. Thompson on Reg. *v.* Bush.

Prop. 9. Proceeding to Proposition 9, it is one easily deducible from Propositions 7 and 8, and affords a convenient opportunity to briefly discuss the subject of legislative power over the royal prerogative.

Legislative power over the royal prerogative. The words of the Proposition are suggested by those of Taschereau, J., in Lenoir *v.* Ritchie,[2] where he says :—"Admitting the theory that the pro-

[1] As to which, see Propositions 14 and 15. In the recent Nova Scotia case of Thomas *v.* Haliburton, 26 N.S. at p. 74, (1893), Graham, E.J., says :—"I think that it was the intention of the British North America Act that crimes of this nature," (*sc.*, libels, forgery, tampering with witnesses), "should be tried by judges appointed and paid by the federal authorities, and not by appointees of the provincial legislature. That it is a usurpation of jurisdiction, which, if allowed in this case," (where the provincial legislature had enacted that the House of Assembly should be a court to adjudicate upon and punish libels upon members during the session of the legislature), "may be delegated to municipal bodies by the same legislature : Reg. *v.* Toland, 22 O.R. 505, citing Reg. *v.* Boucher, Cass. Sup. Ct. Dig., p. 325." The question of the power of provincial legislatures to appoint police magistrates is discussed at length by Mr. Marsh, Q.C., in 8 C.L.T. 97, *seq.*, concluding in the negative. May not, however, the true solution lie in the application of our leading proposition to Nos. 14 and 15 of section 92 of the British North America Act, so that provincial legislatures may be found to have power to appoint, or authorize the appointment of, justices of what may be termed the provincial peace, for the enforcement of laws, under No. 15 of section 92, while the Dominion parliament alone has such powers as to the Dominion peace, that is, as to justices to enforce criminal laws, within the meaning of No. 27 of section 91, (as to which see *supra* pp. 35-7, 49-51), saving always the Queen's prerogative, where that has not been controlled by valid legislative enactment ?

A suggestion as to powers of appointing justices of the peace

[2] 3 S.C.R. at pp. 623-4, 1 Cart. at p. 530, (1879).

vincial laws must be held to be enacted in Her Majesty's name, and I need not consider how far this may be admissible, this can be so only when such laws are strictly within the powers conceded to the provincial legislatures by the Imperial Act. When they go beyond the limits assigned to them, they act without jurisdiction. Her Majesty's authorization to make laws in her name, which, according to this theory, she has given to them by the Imperial Act, can apply only to laws passed within the limits assigned to them by the Act. They cannot avail themselves of that authorization to make laws outside of these limits."

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Lenoir *v.* Ritchie.

Per Taschereau, J.

And in connection with this the words of Armour, C.J., in Regina *v.* Bush,[1] may be cited, where he held that No. 14 of section 92, as to laws relating to the administration of justice, gives local legislatures the exclusive power to appoint justices of the peace, although this was and still is one of the prerogative rights of the Crown, adding :—" If this power was so conferred by the British North America Act, it is of no consequence that Acts of the provincial legislature are assented to only in the name of the Governor-General, while only Acts of the Parliament of Canada are assented to in the name of the Crown, because the Crown by assenting to the British North America Act assented to the powers thereby conferred, and to the exercise of those powers by the Parliament or legislatures upon which they were respectively conferred."

Reg. *v.* Bush.

Per Armour, C.J.

Nevertheless, it was largely upon the ground that provincial Lieutenant-Governors do not represent Her Majesty, and that Her Majesty, therefore, is

[1] 15 O.R. at p. 400, 4 Cart. at p. 692, (1888). See also *supra* pp. 137-9.

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not an integral part of the provincial legislatures, that in Lenoir *v.* Ritchie[1] some of the judges of the Supreme Court of Canada expressed an emphatic opinion that those legislatures, at all events, could not affect or impair the royal prerogatives.[2] The recent decision of the Privy Council, upon which Proposition 7 rests, The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick,[3] has, of course, removed this ground of objection to the provincial power.

The question still remains, however, whether, even conceding the principle enunciated in Proposition 8, of the correlation of executive and legislative power, there is among those legislative powers enumerated in section 92 of the British North America Act, and by that section conferred upon provincial legislatures, any which necessarily imply power to interfere with royal prerogatives. And so in Lenoir *v.* Ritchie[4] Taschereau, J., lays it down that:—"Provincial legislatures cannot, directly or indirectly, interfere with Her Majesty's prerogatives, or with her acts done in the exercise of these prerogatives," and says[5]:—"Which part of section 92, where the sub-

Lenoir *v.* Ritchie.

Does sect. 92 of B.N.A. Act give power to interfere with royal prerogatives?

[1] 3 S.C.R. 575, 1 Cart. 488, (1879).

[2] See per Taschereau, J., 3 S.C.R. at pp. 620-3, 1 Cart. 527-9; per Gwynne, J., 3 S.C.R. at pp. 632-5, 1 Cart. at pp. 538-9, 542. Cf., per Gwynne, J., in Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick, 20 S.C.R. at pp. 699-700, 703. In Mercer *v.* The Attorney-General for Ontario, 5 S.C.R. at p. 663, 3 Cart. at pp. 47-8, (1881), Henry, J., observes:—"The Imperial parliament has never, as far as I have been able to discover, attempted to deal with the peculiar prerogatives of the Crown until previously voluntarily surrendered by the Sovereign."

[3] [1892] A.C. 437.

[4] 3 S.C.R. at p. 628, 1 Cart. at pp. 534-5.

[5] 3 S.C.R. at pp. 620-2, 1 Cart. 527-8. Taschereau, J., goes so far as to say in this portion of his judgment that "under the rule that Her Majesty is bound by no statute unless specially named therein, and that any statute which would divest or abridge the Sovereign of

jects left under their control and authority are enumerated, gives them the power to legislate upon Her Majesty's prerogatives? There is a clause, it is true, giving them exclusive authority over the administration of justice, but, surely, the creation and appointment of Queen's Counsel has never been considered as a part of the administration of justice. . . To grant to these legislatures the exercise of Her Majesty's prerogatives, or the power to give to any one the exercise of these prerogatives, it would require, in my opinion, a very clear enactment, and I cannot find it in the British North America Act."

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No. 14, sect. 92, B.N.A. Act.

But, as has been already seen,[1] in the opinion of Sir Horace Davey and Mr. Haldane, to whom the matter was submitted by the Ontario government, one class of subjects enumerated in section 92, at all events, involves a royal prerogative power, namely, No. 4, which by assigning to provincial legislatures the establishment and tenure of provincial offices, and the appointment of provincial officers, empowers them to appoint, or authorize the Lieutenant-Governor to appoint, to the office of Queen's Counsel, for the purpose of the provincial Courts, and they certainly draw no distinction between such Queen's Counsel and others "assuming to be of the rank of Queen's Counsel known

Opinion of Sir Horace Davey.

Appointment of Queen's Counsel.

his prerogative, in the slightest degree, does not extend to and bind the King, unless there be express words to that effect, even if the power of creating Queen's Counsel could ever have been interpreted to be included in the power over the administration of justice, it remains in Her Majesty, and in Her Majesty alone, as the Imperial statute does not specially give it to the legislatures." And cf. S.C. per Henry, J., 3 S.C.R. at pp. 614-5, 1 Cart. at pp. 520-1; per Gwynne, J., 3 S.C.R. at pp. 635-6, 1 Cart. at pp. 542-3. *Sed quære.* See the Opinion of Sir Horace Davey, *supra* pp. 133-4; also p. 135.

[1] See *supra* pp. 133-4.

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under that name in the Empire," to use an expression of Taschereau, J.[1]

And it would seem that there can be still less doubt as to the power of the Dominion parliament, under its general legislative jurisdiction, to affect the royal prerogatives so far as the internal government of Dominion is concerned. But in the pardoning power case, Attorney-General of Canada *v.* Attorney-General of Ontario, already referred to,[2] Strong, C.J,. in his judgment,[3] after stating that it has been the invariable practice in the case of colonial governors to delegate to them the authority to pardon in express terms by their commission or instructions, which he would think implies that, in the opinion of the law officers of the Crown, the prerogative of pardoning offences is not incidental to the office of a colonial governor, and can only be executed by such an officer in the absence of legislative authority, under powers expressly conferred by the Crown, continues :—" The next question, and one which was argued on this appeal, and which, if we were compelled to decide all the questions presented, we should have been obliged to pronounce upon, is one of the greatest importance, not a question of construction arising in any way upon the British North America Act, but one involving a great principle of the general constitutional law of the Empire. That question is, In what legislature does the power of conferring this prerogative of pardoning, by legislation, upon a representative of the Crown, such as a colonial governor, reside ? Is it possessed by any

Pardoning Power case.

Per Strong, C.J.

The general constitutional law of the Empire.

[1] Lenoir *v.* Ritchie, 3 S.C.R. at p. 627, 1 Cart. at p. 533.

[2] See *supra*. pp. 113-5, 130-3.

[3] 23 S.C.R. at pp. 468-9.

colonial legislature, including in that term under our system of federal government as well the Dominion parliament as a provincial legislature, or is it confined to the Imperial parliament? That the Crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them seems to be a well recognized constitutional canon. Upon this point of the locality of the legislative power to interfere with the royal prerogative, I should have thought that the case of Cushing *v.* Dupuy,[1] and *In re* Louis Marois,[2] decided by the Judicial Committee with reference to the jurisdiction of a colonial legislature to limit appeals to the Queen in Council, would, if not direct authorities, have had at least a very material application to the present question. The judgments delivered in the Supreme Court of Victoria, in the case of Toy *v.* Musgrove,[3] might also have afforded us great assistance." Prop. 8-9

It will be seen, then, that the learned Chief Justice speaks of it as still a question whether a colonial legislature, including in such term both the Dominion parliament and the provincial legislatures, has power to interfere with the royal prerogative,—or such a royal prerogative as that of mercy.[4] Now,

[1] 5 App. Cas. 409, 1 Cart. 252, (1880).

[2] 15 Mo. P.C. 189, (1862).

[3] 14 V.L.R. 349, (1888). See *supra* at pp. 115-20 for extracts from the judgments in this case on the subject of how far royal prerogative powers were vested in the colonial governor. The judges, however, do not any of them discuss the question of the power of the colonial legislature to control the royal prerogative, that not being involved in the decision of the case before them, where the validity of a purely executive act was in question, defended as an exercise of a royal prerogative power to prevent aliens from landing on British soil, but not done under the sanction of any Act of the legislature. See, however, per Kerferd, J., at pp. 412-3; per Williams, J., at p. 421; per Holroyd, J., at pp. 428-9.

[4] See, *supra* at pp. 131-2, the views expressed by Boyd, C., in the Court of first instance in this case.

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the prerogative of mercy is one of the highest prerogatives, and is described as inseparably incident to the Crown.[1] But the prerogative of the Crown as the fountain of justice, with which the two cases of Cushing *v.* Dupuy and *In re* Louis Marois, to which his lordship refers, had to do, seems to stand on the same footing in this respect.[2] They are, however, certainly not direct authorities

Cushing *v.* Dupuy.

[1]Bacon's Abridg., Vol. 6, *sub voce*, "Pardon"; Criminal Law Magazine, Vol. 6, p. 457, *seq.*; Chitty on the Prerogative, pp. 89, 92, 102.

Story on the Constitution.

Majora and minora regalia.

Chitty.

Blackstone.

Attorney-General *v.* Black.

Attorney-General *v.* Judah.

[2]In Story on the Constitution of the United States, 5th ed., p. 133, sect. 184, as elsewhere, the distinction, taken by what the author terms "the Crown writers," is pointed out between the *majora regalia*, —"Such fundamental rights and principles as constituted the basis of the throne and its authority, and without which the King would cease to be Sovereign in all his dominions,"—and minor prerogatives, which it was held "might be yielded, where they were inconsistent with the laws and usages of the place, or were inapplicable to the conditions of the people." Cf. Chitty on the Prerogative, p. 25, who says:—"To illustrate this distinction, the attributes of the King, sovereignty, perfection, and perpetuity, which are inherent in and constitute His Majesty's political capacity, prevail in every part of the territories subject to the English Crown, by whatever peculiar or internal laws they may be governed . . . But in countries which, though dependent on the British Crown, have different and local laws for their internal government, as, for instance, the plantations or colonies, the minor prerogatives and interests of the Crown must be regulated and governed by the peculiar and established law of the place." And so Blackstone (Steph., 11th ed., Vol. 2, p. 483) cites from the feudal writers the words:—Majora regalia imperii præëminentiam spectant; minora vero ad commodum pecuniarium immediate attinent; et hæc proprie fiscalia sunt, et ad jus fisci pertinent. Cf. on the above distinction per Dorion, C.J., Monk *v.* Ouimet, 19 L.C.J. at p. 75, (1874); Attorney-General *v.* Black, Stuart, 324, (1828), where Reid, C.J., says:—"We take the principle to be that in all cases where the greater rights and prerogatives of the Crown come in question recourse must be had to the public law of the Empire, as that alone by which such rights and prerogatives can be determined. But the debt here demanded is a minor right,"—which might be thought to exclude the greater prerogatives altogether from local legislation. But Attorney-General *v.* Judah, 7 L.N. 147, (1884), on the other hand, appears to recognize that the local legislature could, by express enactment, affect even the "rights or prerogatives of the Crown as attributes of sovereignty." See also the words of Strong, C.J., in the Queen *v.* Bank of Nova Scotia, 11 S.C.R. at p. 17, *seq.*, 4 Cart. at p. 403, *seq.*, quoted *supra* pp. 79-80, in which case, however, the Court was concerned entirely with one of the minor prerogatives, namely, the right to priority of payment; and Stokes on the Colonies, p. 243.

on the point in question, and, it is submitted, are not, in fact, authorities on it at all. In the former their lordships especially say[1]:—"It is, in their lordships' view, unnecessary to consider what powers may be possessed by the parliament of Canada to interfere with the royal prerogative," nor do they touch the question, except as to the principle that the rights of the Crown can only be taken away by express words, which they affirm. Nor in *In re* Louis Marois was it necessary to determine the point, for, as Lord Chelmsford states, the Act of Lower Canada there in question as to appeals to the Privy Council, 34 Geo. III., c. 6, especially provided by section 43, that "nothing herein contained shall be construed in any manner to derogate from the rights of the Crown," etc. In both these cases, however, the prior decision of Cuvillier *v.* Aylwin is cited.[2] That was a petition for leave to appeal to His Majesty in Council, notwithstanding the restriction imposed by the same Act of Lower Canada as was in question in *In re* Louis Marois; and Sir John Leach, M.R., delivering judgment, said:—"It is not necessary to hear counsel on the other side. The King has no power to deprive the subject of any of his rights; but the King, acting with the other branches of the legislature, as one of the branches of the legislature, has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights." By reason of section 43 of the Act just referred to, it may be said that this expression of view was not necessary to the decision of their lordships in the case; but in the subsequent case of

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In re Louis Marois.

Cuvillier *v.* Aylwin.

[1] 5 App. Cas. at pp. 416-7, 1 Cart. at p. 259.

[2] 2 Kn. P.C. 72, (1832).

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Queen *v.* Byramjee.

The Privy Council.

Lenoir *v.* Ritchie.

Per Gwynne, J.

The Queen *v.* Edulgee Byramjee,[1] their lordships refer to Cuvillier *v.* Aylwin, and say of it :—"It was held that though there was a reservation of the right of the Crown, yet as the Act in Canada was made in pursuance of an Act of parliament of Great Britain, the powers contained in that Act did take away the prerogative of the Crown."[2] Thus it would seem that in their lordships' view a colonial Act assented to by the Crown through its authorized representative could interfere with and regulate the exercise of the prerogatives of the Crown as the fountain of justice, so far as the rights of those under its jurisdiction were concerned. If so, there must be a similar power as to other royal prerogatives of the same character, subject, of course, to the Crown's right of veto. And certainly it would seem that there is such power, if Gwynne, J., is correct in what he says in Lenoir *v.* Ritchie[3] :—"An Act of parliament passed by the old legislatures of the respective provinces which now constitute the federated provinces of the Dominion of Canada, under the constitutions which they had before Confederation, of which legislatures Her Majesty was an integral part, as she is of the Imperial parliament, upon being assented to by the Crown, was competent to divest Her Majesty of the right to exercise within the province any portion of her royal prerogative."[4]

[1] 5 Mo. P.C. at p. 295, (1846).

[2] In *In re* Louis Marois, 15 Mo. P.C. 189, (1862), however, their lordships observe that the Master of the Rolls in Cuvillier *v.* Aylwin does not appear to have directly adverted to the proviso in section 43 of the Lower Canadian Act.

[3] 3 S.C.R. at p. 632, 1 Cart. at pp. 538-9.

[4] That there was a time, however, when it was the opinion of eminent lawyers that colonial legislatures could not enact anything against Her Majesty's prerogatives, at all events her greater prerogatives, seems clear : Chalmer's Opinions, pp. 50, 373.

PROPOSITION 10.

10. The possession by the Federal Government of the veto power over Provincial legislation is a special feature of the Constitution of the Dominion of Canada, which distinguishes it from the Constitution of the United States of America.

The Privy Council. Bank of Toronto *v.* Lambe. This is pointed out very distinctly by the Privy Council in Bank of Toronto *v.* Lambe,[1] where, after having decided in favour of the validity of a certain Act passed by the Quebec legislature in 1882, whereby certain direct taxes were imposed on all banks doing business in that province, although it was suggested that the legislature might lay on taxes so heavy as to crush a bank out of existence, and so nullify the power of the Dominion parliament to erect banks, their lordships say:—"Their lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their lordships understand, each State may make laws for itself, uncontrolled by the federal power, and

Fundamental difference between the constitution of the United States,

[1] 12 App. Cas. at p. 587, 4 Cart. at pp. 22-3, (1887).

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subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution, Chief Justice Marshall found one of those limits at the point at which the action of the State legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under section 92, which may, by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other. Their lordships have to construe the express words of an Act of parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself, except under the control of the whole, acting through the Governor-General, and the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence, because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament."

In respect to the relation between State legislatures and Congress,

And that of Canada,

In respect to the relation between the provincial legislatures and Parliament.

And in Angers *v.* The Queen Insurance Co.[1] Ramsay, J., thus refers to this distinction in the constitution of the two countries:—"It should be

And so per Ramsay, J.

[1] 22 L.C.J. at pp. 309-10, 1 Cart. at pp. 134-5, (1878). And see Bryce's American Commonwealth, (two-volume edition), Vol. 1, at pp. 313-14.

observed that there is a fundamental difference between our constitution and that of the United States. Here the powers of the legislatures and governments are partitioned by a supreme authority, which has given to the Dominion organization, not only all unassigned powers, not purely of a private or local nature, but also, specially, the power to control absolutely, by disallowance, the legislation of the provinces. In the United States the central government holds its authority from the States, and has no power over the States' legislation other than that it may acquire through the Supreme Court. Here, then, we have by the constitution a complete check on any practical inconvenience arising from the abuse of the powers confided to the provincial legislatures, which is entirely wanting in the constitution of the United States, a defect which may justify, to some extent, the decisions there on this matter," (*sc.*, on the Courts intervening when the rate of license is so great as to interfere with trade).

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The Dominion power of disallowance

Is a complete check.

Although, therefore, it may well be, as Fournier, J., said in his judgment in Severn *v.* The Queen,[1] that it cannot be argued that because this right of veto by the Governor-General exists, we must adopt an interpretation which would lead to the necessity of having recourse to it, yet the language of the Privy Council would seem to justify Ritchie, J., in the reliance which, in this last mentioned case[2], he places on the federal veto power. Holding, as he does, against the opinion of the majority of the Court,[3] that No. 9 of section 92 gives to the local legislatures a general power as to licenses in

Severn *v.* The Queen.

[1] 2 S.C.R. at pp. 131-2, 1 Cart. at p. 476, (1878).

[2] 2 S.C.R. at p. 102, 1 Cart. at pp. 445-6.

[3] See *supra* p. 27, n. 1.

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order to the raising of a revenue for provincial, local, or municipal purposes, notwithstanding that, as was urged, such a construction conflicts with the power of the Dominion government to regulate trade, and commerce, and taxation, he adds:—"Should at any time the burden imposed by the local legislature under this power, in fact conflict injuriously with the Dominion power to regulate trade and commerce, or with the Dominion power to raise money by any mode or system of taxation, the power vested in the Governor-General of disallowing any such legislation practically affords the means by which serious difficulty may be prevented."[1] And in much the same way Strong, J., says[2]:—"The imposition of licenses authorized by No. 9 of section 92 is, it will be observed, confined to licenses for the purposes of revenue, and it is not to be assumed that the provincial legislatures will abuse the power, or exercise it in such a way as to destroy any trade or occupation. . . And, however carefully the purpose or object of such an enactment might be veiled, the foresight of those who framed our constitutional Act led them to provide a remedy in the 90th section of the Act, by vesting the power of disallowance of provincial Acts in the executive power of the Dominion, the Governor-General in Council." On the other hand, the view of Richards, C.J.,[3] and Fournier, J.,[4] as expressed in this case, would seem to be that the existence of the veto power has little or no bearing on the question of whether on the proper construction of the

Per Ritchie, J.

The federal veto power prevents serious difficulty.

And so per Strong, J.

B.N.A. Act, sect. 90.

[1] Cf. the similar words of Draper, C.J., in Reg. *v.* Taylor, 36 U.C.R. at p. 224, (1875).

[2] S.C., 2 S.C.R. at pp. 108-9, 1 Cart. at pp. 452-3.

[3] 2 S.C.R. at p. 96, 1 Cart. at pp. 439-40.

[4] 2 S.C.R. at pp. 131-2, 1 Cart. at pp. 475-6.

various parts of sections 91 and 92 of the British North America Act, local legislatures have powers which, in their exercise, might conflict with the legislation of the Dominion parliament. Prop. 10

Again, Draper, C.J., refers to the veto power in the Goodhue case,[1] saying:—"Though our legislature is limited by the Constitutional Act to certain defined subjects, the Act imposes no limit to the exercise of the power on those subjects. It does provide checks, for the Lieutenant-Governor may withhold the necessary assent, or the Governor-General may disallow Acts to which his subordinate has assented." And, again[2]:—"In regard to the absence of a second chamber, it may be further observed, so far at least as estate or private Bills are concerned, that as such Bills involve ordinarily no mere party political consideration, all those whose interests are or may be touched have a right, in the first place, to expect a careful examination of their contents on the part of the provincial Executive, and a withholding of the royal assent if it is found that the promoters of the Bill are seeking advantages at the expense of others, whose interests are as well grounded as their own. And, further, if from oversight, or any other cause, provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or even possible interests, by retroactive legislation, such Bills are still subject to the consideration of the Governor-General, who, as the representative of the Sovereign, is entrusted with authority, to which a corresponding duty attaches, to disallow any law

The Goodhue case.

Per Draper, C.J.

The veto power

May supply the absence of a second chamber

In checking legislative injustice in the provinces.

[1] 19 Gr. at p. 385, 1 Cart. at p. 568, (1873).

[2] 19 Gr. at p. 384. This passage is omitted by Mr. Cartwright.

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contrary to reason, or to natural justice or equity. So that while our legislation," (*sc.*, Ontario legislation), " must unavoidably originate in the single chamber, and can only be openly discussed there, and, once adopted there, cannot be revised or amended by any other authority, it does not become law until the Lieutenant-Governor announces his assent, after which it is subject to disallowance by the Governor-General."

So per Ramsay, J.

So, too, in The Corporation of Three Rivers *v.* Sulte,[1] Ramsay, J., of the Quebec Court of Queen's Bench (Appeal side), observes :—" The true check for the abuse of powers, as distinguished from an unlawful exercise of them, is the power of the central government to disallow laws open to the former reproach. Probably to a certain class of minds this interference appears ' harsh ' and provocative of ' grave complications,' as has been said ; but this is hardly an argument in favour of the Courts extending their jurisdiction to relieve the central government of its responsibility. It seems to be fairer to leave the rule of expediency to be applied by a body responsible to the people at large, rather than to a comparatively irresponsible body like a Court."

Three Rivers *v.* Sulte.

Per Harrison, C.J.

And in Leprohon *v.* City of Ottawa,[2] Harrison, C.J., says :—" The power of the Governor-General in Council to disallow a provincial Act is as absolute as the power of the Queen to disallow a Dominion Act, and is, in each case, to be the result of the exercise of a sound discretion, for which exercise of discretion the Executive Council for the time being

[1] 5 L.N. at pp. 334-5, 2 Cart. at pp. 289-90, (1882).

[2] 40 U.C.R. at p. 490, 1 Cart. at p. 647, (1877).

is, in either case, to be responsible as for other Acts of executive administration." Prop. 10

And here it may be well to digress for a moment to consider a point in connection with this matter noticed by Taschereau, J., in Lenoir *v.* Ritchie,[1] namely, that the power of veto is given to the Governor-General in Council, not to the Governor-General himself.[2] The learned judge argues from this that it cannot possibly be said that Her Majesty is bound by a provincial statute, because it has not been vetoed at Ottawa by the Governor-General in Council,[3] for :—"It cannot be contended that the Governor-General in Council is the Queen, or the representative of the Queen, or that the Governor-General in Council exercises the prerogatives of the Queen, or can give directly or indirectly to any person or public body the right to exercise such prerogatives. . . The Governor-General alone exercises the prerogatives of the Queen in her name in all cases in which such prerogatives can be exercised in the Dominion by any one else than Her Majesty herself."[4]

It is the Governor-General in Council to whom veto power is given.

Argument of Taschereau, J., thereon.

And in Regina *v.* Bennett,[5] Cameron, J., explains this language of Taschereau, J., as follows :—"Of course, the learned judge is treating the Governor-General in Council as acting upon the advice of the

As explained in Reg. *v.* Bennett.

[1] 3 S.C.R. at p. 624, 1 Cart. at pp. 530-1, (1879).

[2] See sections 56 and 90 of the British North America Act.

[3] As to this see Propositions 7, 8, and 9, and the notes thereto, from which it would appear that if Her Majesty is bound by a provincial statute, it is because such statute has been assented to by the Lieutenant-Governor, her representative in the provincial legislature, rather than because it has not been vetoed by the Governor-General.

[4] But as to this see *supra* p. 109.

[5] 1 O.R. at pp. 461-2, 2 Cart. at pp. 641-2, (1882).

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Council,[1] the members of which are responsible under our constitution to Parliament for their advice, as shown by the action following, or the result of such advice; while in the exercise of pure matters of prerogatives, as distinct from acts indicating or carrying into effect the policy of the government, he acts of his own mere motion independently of or even against the advice of the Privy Council, if he has chosen to consult them upon the subject. The learned judge, too, in using the language I have quoted, was doing it for the purpose of showing that the fact of an Act of the local legislature not having been disallowed by the Governor in Council could not be taken as an indication that Her Majesty had thereby impliedly consented to any curtailment or transfer of the right of exercise of the royal prerogative that such Act might work."

Per Cameron, J.

And in Mercer *v.* The Attorney-General for Ontario,[2] Gwynne, J., says:—"The power of disallowing Acts of the provincial legislature is no longer, as it was under the old constitution of the provinces, vested in Her Majesty, but in the Governor-General of the Dominion in Council, and this is for the purpose of enabling the authorities of the Dominion to exercise that branch of sovereign power formerly exercised by Her Majesty in right of her prerogative royal, but to be exercised no longer as a branch of the prerogative, but as a power by statute vested in the Dominion authorities (the royal prerogatives being, for that purpose, extinguished)."

Per Gwynne, J.

Federal veto power not the same as the old prerogative power.

[1] Section 13 of the British North America Act specially provides that:—"The provisions of this Act, referring to the Governor-General in Council, shall be construed as referring to the Governor-General acting by and with the advice of the Queen's Privy Council for Canada."

[2] 5 S.C.R. at pp. 711-2, 3 Cart. at p. 84, (1881).

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But whether it be or be not proper to say that when the Governor-General in Council vetoes a provincial Act he exercises a royal prerogative power, he certainly does that, as all other executive acts, as representative of the Queen, in whom, as section 9 of the Act declares, the executive government and authority of and over Canada continues and is vested. And as to the significance of the fact that the power of veto is given to the Governor-General in Council, and not to the Governor-General himself, it may be well to recall the words of Sir John Macdonald, in an official memorandum :—"Whether in any case power is given to the Governor-General to act individually or with the aid of his Council, the act, as one within the scope of the Canadian constitution, must be on the advice of a responsible minister. The distinction drawn in the statute between an act of the Governor and an act of the Governor in Council is a technical one, and arose from the fact that, in Canada, for a long period before Confederation, certain acts of administration were required by law to be done under the sanction of an order in Council, while others did not require that formality. In both cases, however, since responsible government has been conceded, such acts have always been performed under the advice of a responsible ministry or minister."[1]

Sed quære as to this distinction.

Sir John Macdonald.

[1]Com. Pap. 1878-9, Vol. 51, p. 153; Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 454. In a despatch of the Secretary of State for the Colonies to the Governor-General, of July 3rd, 1879, (Can. Sess. Pap., 1880, No. 18), in reference to the Letellier case, he says :—"It has been noticed that while under section 58 of the Act the appointment of a Lieutenant-Governor is to be made 'by the Governor-General in Council by instrument under the Great Seal of Canada,' section 59 provides that 'a Lieutenant-Governor shall hold office during the pleasure of the Governor-General,' and much stress has been laid upon the supposed intention of the legislature in thus varying the language of these sections. But it must be remembered that other powers,

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The Secretary of State for the Colonies on the veto power.

To return to the general subject before us, the veto power of the federal government in Canada is that principle of central control which Mr. Cardwell, as Secretary of State for the Colonies, in his despatch to the Governor-General, of December 3, 1864,[1] acknowledging the receipt of the Quebec Resolutions, says Her Majesty's government were glad to observe had been steadily kept in view, although large powers of legislation were intended to be vested in local bodies, adding:—"The importance of this principle cannot be overrated. Its maintenance is essential to the practical efficiency of the system, and to its harmonious operation, both in the general government and in the governments of the several provinces." As was natural, special attention was called to it in the debates in the parliament of the province of Canada before Confederation. Thus Sir John Rose said[2]:—"The other point which commends itself so strongly to my mind is this, that there is a veto power on

Its maintenance is essential.

Allusions to it in debates before Confederation.

vested in a similar way in 'the Governor-General,' were clearly intended to be and in practice are exercised by him, by and with the advice of his Ministers; and though the position of a Governor-General would entitle his views, on such a subject as that now under consideration, to peculiar weight, yet Her Majesty's Government do not find anything in the circumstances which would justify him in departing, in this instance, from the general rule, and declining to follow the decided and sustained opinion of his Ministers, who are responsible for the peace and good government of the whole Dominion to the Parliament to which, according to the 59th section of the statute, the cause assigned for the removal of a Lieutenant-Governor must be communicated." And so in the Australian Colony of Victoria it has been held by Higinbotham, C.J., that the word "Governor" in the provisions of the Constitution Act, and all Acts passed since that Act, which empower the Governor to do various acts, means the Governor acting by and under the advice of one or more of the responsible Ministers of the Crown in Victoria: Attorney-General *v.* Goldsbrough, 15 V.L.R. 638, at p. 647, (1889).

[1]Can. Sess. Pap., 1865, Vol. 24, No. 12, p. 11. In a letter in 18 C.L.J. at p. 267, Mr. Alpheus Todd calls the federal veto power "the keystone of the fabric of Confederation."

[2]Debates on Confederation, at p. 404.

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the part of the general government over all the legislation of the local parliaments. That was a fundamental element which the wisest statesman engaged in the framing of the American constitution saw, that if it was not engrafted in it must necessarily lead to the destruction of the constitution . . . I believe this power of negative, this power of veto, this controlling power on the part of the central government, is the best protection and safeguard of the system; and if it had not been provided, I would have felt it very difficult to reconcile it to my sense of duty to vote for the resolutions." And again, in the same debates, Mr. Alexander Mackenzie said[1]:—"The veto power is necessary in order that the general government may have a control over the proceedings of the local legislatures to a certain extent. The want of this power was the great source of weakness in the United States, and it is a want that will be remedied by an amendment in their constitution very soon."

Sir John Rose.

The veto a fundamental element in the constitution.

The Hon. Alex. Mackenzie.

These expressions, as Mr. Goldwin Smith has justly said,[2] "plainly refer to a power of political control to be exercised in the interest of the nation, not to a mere power of restraining illegal stretches of jurisdiction, a function which belongs, not to a government, but to a Court of law."[3] And it is surely

Mr. Goldwin Smith.

[1] *Ibid.*, at p. 433.

[2] Canada and the Canadian Question, (Macmillan & Co., 1891), at p. 159.

[3] Referring to these debates on Confederation in the parliament of Canada, Mr. Clement says, (Canadian Constitution, p. 173):—"Throughout the debates, it was clearly recognized that the exercise by the Dominion government of the power of disallowance was to be exercised in support of federal unity, *e.g.*, to preserve the minorities in different parts of the confederated provinces from oppression at the hands of the majorities." And in his History of the Dominion of Canada, (Clarendon Press, 1890), at p. 222, Mr. Greswell presents another pleasing aspect of the veto power, namely, as enabling the central or Dominion government to be "the nurse of weakling provinces."

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illogical and unreasonable for advocates of extreme provincial rights to claim the full benefit of the doctrine of Bank of Toronto *v.* Lambe[1] embodied in Proposition 61,—that if a legislative power falls within section 92 of the British North America Act, it is not to be restricted, or its existence denied, because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament,—and, at the same time, endeavour to ignore or nullify the controlling power of the Dominion veto so pointedly referred to in that very case.[2]

Advocates of extreme provincial rights.

Although, then, the Dominion veto power, which "works in the plane of political expediency as well as in that of jural capacity,"[3] may not come strictly within the scope of the present work, it is sufficiently closely connected with the law of legislative power in Canada to justify some further observations in respect to it.

Features of Dominion veto power

One year, and no longer period, is allowed by the British North America Act, (section 90), within which a provincial Act may be disallowed by the Governor-General in Council; and however detrimental, from the point of view of the federal government, experience of its working may have shown it to be, it cannot afterwards be vetoed. This is a peculiar feature of our constitutional

Must be exercised within a year.

[1] 12 App. Cas. at pp. 586-7, 4 Cart. at pp. 22-3, (1887).

[2] At the interprovincial Conference at Quebec, in 1887, the very first of the resolutions agreed to demands an amendment of the British North America Act so as to do away with the federal veto of provincial Acts, leaving such Acts "subject only to disallowance by Her Majesty in Council as before Confederation." These resolutions are referred to in Ont. Sess. Pap., 1887, No. 51, and Can. Sess. Pap., 1889, No. 65, but not printed. They were published *verbatim* in *The Toronto Daily Mail* newspaper of November 10th, 1887.

[3] Per Boyd, C., in Attorney-General of Canada *v.* Attorney-General of Ontario, 20 O.R. at p. 245.

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system which was referred to by Mr. Edward Blake in his report as Minister of Justice of October 13th, 1875, cited *supra* at pp. 161-2.[1] Again, it would seem that provincial Acts, if disallowed, must be disallowed altogether; this or that clause of an Act cannot be vetoed without the remainder.[2] And as Sir John Thompson, in his report to the Governor-General, of December 27th, 1893, in respect to certain British Columbia Acts, points out, there is no power vested in the Governor-General "to make a conditional disallowance, or to . . . suspend the operation of a statute, so that the same may have no force or effect until and unless it be assented to by a majority of the members of a legislature constituted differently from that which exists."[3]

Part of Act only cannot be vetoed.

Nor can the disallowance be conditional.

Moreover, the Dominion House of Commons cannot constitutionally interfere with the operation of provincial Acts by passing resolutions urging their disallowance by the Governor-General. "If such a resolution were allowed to have effect, it would amount to a virtual repeal of the section of the British North America Act, 1867, which gives the exclusive right of legislating on these matters to the provincial legislatures."[4]

Not constitutional for the Dominion House of Commons to control veto power.

[1] It may be noted in this connection that under the Imperial Municipal Reform Act, 1835, the Crown was invested with authority to disallow corporation by-laws or any part thereof: 5-6 Will. 4, sect. 90; Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 428.

[2] Hodgins' Prov. Leg., Vol. 1, at pp. 674-5; and see the passage quoted in the notes to Proposition 34, *infra*, from Sir John Thompson's report as Minister of Justice, of March 1st, 1890, in reference to a Manitoba Act.

[3] See *supra* p. 174, n. 1.

[4] Despatch of the Secretary of State for the Colonies to the Governor-General of June 30th, 1873: Hodgins' Prov. Legisl., Vol. 1, at p. 506; see also, *ibid.*, Vol. 2, at p. 250. Nevertheless, in the session of 1889, a resolution in favour of disallowing the Act respecting

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The actual practice in its exercise,

As to provincial Acts which are *intra vires*,

And as to provincial Acts of doubtful constitutionality.

And as to the actual practice of the Dominion government in respect to the exercise of the veto power, it appears to be a prevailing rule that where a provincial Act is clearly within the competency of the legislature passing it, and does not conflict with Dominion or Imperial policy or interests, it should be left to its operation, though it may be open to objection as unjust or otherwise contrary to sound principles of legislation; while as to provincial statutes of doubtful constitutional validity, Sir John Thompson, in his report, as Minister of Justice, to the Governor-General in Council, of July 10th, 1889, in respect to a petition presented to the latter for the reference of the Jesuits' Estates Act to the Supreme Court, says :—"Most of these have been left to their operation, and their validity has been left to be tested by those interested in doing so. Indeed, this course has nearly always been followed, in the case of Acts of doubtful constitutionality, excepting where some interference with the powers of the federal government would result, or where serious confusion or public injury was likely to ensue from such a course."[1]

the settlement of the Jesuits' Estates, (51-52 Vict., c. 13, Q.), was proposed in the Dominion parliament, but was, after a thorough discussion, negatived by an overwhelming majority. For the whole history of the Jesuits' Estates Act, see Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 484, *et seq.*

[1]This report was published in the issue of the *Empire*, a Toronto newspaper, of August 12th, 1889. See, also, *supra* p. 174, n. 1. It would seem that at the time of the passing of the British North America Act, it was anticipated that the veto power would be more resorted to in respect to such Acts than it has been, for, on March 1st, 1867, Mr. Adderley, Under-Secretary of State for the Colonies, when asked, in the British House of Commons, how a conflict of jurisdiction between the parliament of Canada and the provincial legislatures would be settled, replied that he did not think that any serious conflict of the kind anticipated by the honourable member could take place so long as a supreme power was vested in the Governor-General to veto Acts: Hans., 3rd Series, Vol. 185, p. 1319.

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However, very recent instances are not wanting in which the Dominion government has taken strong ground against provincial legislation, as unjust and contrary to sound principles of legislation. Thus, in 1893, it objected strenuously and with success to section 115 of the Nova Scotia Act of 1892, (55 Vict., c. 1), amending and consolidating the Acts relating to mines and minerals, on the ground that it prejudiced the vested rights, then in litigation, of certain individuals who had petitioned the Governor-General in Council in respect to it. In his report upon the matter of May 18th, 1893, Sir John Thompson recognizes the fact of a provincial enactment prejudicing private vested rights as a possible ground for the exercise of the power of disallowance, and says :—"It appeared to the undersigned that the section in question might have the effect of which the petitioners complained, and he accordingly suggested to the Attorney-General of Nova Scotia the justice of an amendment repealing section 115 in so far as it might affect pending litigation. The Attorney-General adopted the suggestion and introduced a bill, which was passed and received assent at the present session of the Nova Scotia legislature, which removed the ground of objection urged by the petitioner." The correspondence which issued in this result is of interest. The Attorney-General of Nova Scotia (Mr. Longley) writes to the department :—"Whatever may have been the intention of the legislature, it may be frankly conceded that if the effect of a clause is to work injustice to any suitors before the Courts it is a fair question whether it should not be repealed ;" and he enters upon a discussion of the merits of the petitioners' case, while declaring the clause in question entirely and exclusively within the legislative

Recent instances of Dominion interference to prevent injustice in provincial legislation.

Interference with vested rights.

Sir John Thompson.

Nova Scotia Act of 1892 as to mines and minerals.

The correspondence in respect thereto.

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competency of the legislature of Nova Scotia. In a later letter to the Deputy-Minister of Justice he announced that, "in compliance with your suggestion," the government would introduce a Bill repealing the obnoxious section "so far as it relates to pending suits," but that the Bill would be submitted to the committee on law amendments to hear evidence as to the real merits of the petitioners' case, and the fate of the Bill must depend upon the judgment of the House and committee. To this the Deputy-Minister rejoins, in a letter of April 24th, 1893:—"I beg to say, if the principle is to be admitted that legislation is improper which takes away the rights of suitors in pending litigation, it would seem to follow that such legislation could scarcely be justified because the legislature, after full hearing of both sides in committee, had refused to repeal it. The section complained of appears to come within the principle, and I trust that by enacting the proposed measure the legislature may free this department from further consideration of the petition."[1]

Legislation affecting rights *pendente lite* improper.

So, again, in a report to the Governor-General of June 2nd, 1893, Sir John Thompson says with reference to an Ontario Act, (55 Vict., c. 8), which was complained of by a certain railway company:—"The Minister observes that assuming the statute to have the effect which the railway company attribute to it, the case would appear to be that of a statute which interferes with vested rights of property and the obligation of contract without providing for compensation, and would, therefore, in his opinion, furnish sufficient reason for the exercise of the power of disallowance." He

So in case of an Ontario Act of 1892,

Sir J. Thompson takes firm ground against provincial interference with vested rights.

[1] See *supra* p. 174, n. 1.

came to the conclusion, however, that the Act could not be so construed as to have such effect, and says that:—"For that reason, but for that reason only, he recommends that the Act should be left to its operation." This, moreover, was in face of a letter of the provincial Attorney-General, Sir Oliver Mowat, in which he says:—"I repudiate the notion of the petitioners that it is the office of the Dominion government to sit in judgment on the right and justice of an Act of the Ontario legislature relating to property and civil rights. That is a question for the exclusive judgment of the provincial legislature."

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Protest of provincial Attorney-General.

It is, at all events, very certain that, in the exercise of the veto power, the Dominion government have not confined themselves within the limits suggested by Casault, J., in Guay *v.* Blanchet[1]:—"The veto can be pronounced by the Queen only when a law assented to by the Governor-General encroaches upon the prerogatives of the Sovereign or of the Imperial parliament; and that allowed to the Governor-General can equally only be exercised when a provincial law makes the same encroachments, or trespasses upon the rights of the federal parliament . . . So long as the legislatures abide within the limits of what this section of the Act attributes to them," (*sc.*, section 92 of the British North America Act), "their powers and their authority are absolute, and admit of neither superiors, nor intervention, nor censure."[2]

Per Casault, J.

As to proper limits of federal veto power.

[1] 5 Q.L.R. at p. 53, (1879).

[2] Translated from the French. On the whole subject of Dominion control in matters of legislation, see Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 432, *et seq.*, especially the memorandum of the Deputy-Minister of Justice at p. 529, *et seq.* See, also, *ibid.* at pp. 610, 622. Reference may also be made to Can. Sess. Pap., 1877, No. 89, being a return of March 1st, 1877, of all correspondence between the

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Imperial government cannot veto provincial Acts.

It remains to mention that no power of confirmation or disallowance of Acts of the provincial legislatures rests with the Imperial authorities. As Taschereau, J., says in Lenoir *v.* Ritchie[1]:—"It is well known that provincial statutes cannot be disallowed in England, and that they are not transmitted to the Imperial authority under the British North America Act, as the federal statutes are."[2]

federal and provincial governments concerning the disallowance of provincial Acts, or the action on provincial Bills reserved; Hodgins' Prov. Legisl., esp. Vol. 1, at pp. 5, 25, 51, 184-5, 188, 208, 255, *et seq.*, 278, 283, 311-2, 516, 525, 579-80, 583, 616, 619, 663, 667, 734, 765, 770, 782, 796-7, 809, 811, 820, 828, 841, 846, 871, 897, 899, and Vol. 2, at pp. 7, 88, 196, 292, being passages noted as especially illustrating the mode in which the Dominion government has dealt with provincial Acts considered to be contrary to sound principles of legislation, or contrary to the policy and interest of the Dominion; articles on Dominion control over Provincial Legislation, 17 C.L.J. at pp. 217, 234; also on Constitutional Limitations, 1 Western Law Times 17; on Federal government in Canada, (by Mr. Bourinot), 9 C.L.T. at p. 204, *et seq.;* and on The Power of Disallowance and its Natural Importance, by the Hon. James Cockburn, in Rose-Belford's *Canadian Monthly*, Vol. 8, pp. 292, 420. As to when a provincial Act should be reserved by the Lieutenant-Governor for the assent of the Governor-General, see Hodgins' Prov. Legisl., Vol. 1, at pp. 79-80, 907.

[1] 3 S.C.R. at p. 624, 1 Cart. at p. 531, (1879).

[2] See, on this subject, the despatch of Lord Carnarvon to the the Governor-General of April 14th, 1876, Hodgins' Prov. Legisl., Vol. 1, p. 125; the opinion of the Lord President of the Council, under date December 13th, 1872, *ibid.*, Vol. 1, at pp. 494-5; the report of the Minister of Justice, of March 5th, 1888, *ibid.*, Vol. 2, at p. 259; the despatch from Lord Knutsford to Lord Lansdowne, of April 19th, 1888, *ibid.*, Vol. 2, at p. 335. But that it cannot be said without qualification that the right of Imperial intervention and control has been surrendered even in reference to provincial legislation, see Todd's Parl. Gov. in Brit. Col., 2nd ed., at pp. 29-30, 479-83, 512. And on the general subject of the Imperial veto power over colonial legislation, see Todd, *ibid.*, at page 155, *et seq.* At page 158 the author states:—"Since the concession of responsible government to the principal colonies of Great Britain, as well as formerly, the Imperial government, while seldom resorting to the extreme measure of disallowing colonial Acts, has repeatedly pointed out in despatches from the Secretary of State for the Colonies to the governor of the colony errors, defects, or omissions in colonial laws which require to be remedied by further legislation, and has cautioned the colonial government as to the spirit in which certain exceptional powers, granted by a colonial Act, which had been approved by the Imperial government, should be made use of, so as to avoid abuse or oppression. In this way the paternal oversight of Her Majesty's government has frequently been exercised for the benefit of the colonies without encroachment."

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Having thus referred to the subject of the Imperial veto, which is confined to Dominion Acts, a reference may be pardoned to what is said by Professor Dicey with regard to it in his Introduction to the Study of the Law of the Constitution,[1] where, after observing that the British parliament might render a colonial Act of no effect by means of an Imperial statute, he says :—" This course, however, is rarely, if ever, necessary, for Parliament exerts authority over colonial legislation by in effect regulating the use of the Crown's 'veto' in regard to colonial Acts. This is a matter which itself needs a little explanation. The Crown's right to refuse assent to Bills which have passed through the Houses of Parliament is practically obsolete. The power of the Crown to negative or veto the Bills of colonial legislatures stands on a different footing. It is virtually, though not in name, the right of the Imperial parliament to limit colonial legislative independence, and is frequently exercised."[2]

Professor Dicey as to Imperial veto of colonial Acts.

It virtually represents the power of control of the Imperial parliament.

[1] 3rd ed., at pp. 107-8.

[2] If the Crown in England disallow a colonial Act, it becomes of no effect from the date of publication of such disallowance in the colony ; but things done under it while in force remain valid : Mill's Colonial Constitutions, at p. 33. Cf. section 56 of the British North America Act, which provides that the disallowance shall annul the Act from and after the day of signification by the Governor-General, as therein provided.

PROPOSITION 11.

11. No consent or acquiescence of the Crown by non-exercise of the veto power, or otherwise, can render valid an Act otherwise *ultra vires* and unconstitutional under the British North America Act.

Lenoir *v.* Ritchie.

Per Henry, J.

Per Taschereau, J.

An *ultra vires* Act is a nullity.

Thus in Lenoir *v.* Ritchie[1] Henry, J., says:—"The special assent of the Queen to the local Act, providing for the issuing of patents of legal precedence, could not, in my opinion, validate it. The local legislatures have, as I have already stated, a prescribed and limited jurisdiction, and, if the subject in question is beyond their legislative limit, the mere sanction of the Queen could not validate the Act passed in reference to it."[2] And in the same case[3] Taschereau, J., observes:—"A provincial statute passed on a matter over which the legislature has no authority or control under the British North America Act is a complete nullity, a nullity of *non esse*. *Defectus potestatis, nullitas nullitatum.* No power can give it vitality. Still less can it get vitality from the mere non-vetoing of the superior authority. In fact, the veto, in such a case, does not add to its nullity. It records it; it gives notice of it, but it cannot avoid what does not

[1] 3 S.C.R. at pp. 612-3, 1 Cart. at p. 518, (1879).

[2] As to the value of the reports of Ministers of Justice, upon which the exercise or non-exercise of the veto power practically depends, as opinions on questions relating to legislative power in Canada, see *supra* p. 140, n. 4.

[3] 3 S.C.R. at pp. 624-5, 1 Cart. at pp. 531-2.

exist. *Quod nullum est ipso jure, rescindi non potest.* The legislatures have the powers conceded to them by the British North America Act, and no others. And no one, no authority, (except the Imperial parliament, of course),[1] either impliedly or expressly, can add to those powers, and give to these legislatures a right or rights which they do not have by the Imperial Act. If they pass an Act *ultra vires*, this Act is null, whether vetoed at Ottawa or not."

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Non-exercise of the veto power cannot give it vitality.

In Ganong *v.* Bayley,[2] indeed, where the validity of a New Brunswick Act to establish Parish Courts, for the trial of civic causes before Commissioners appointed by the Lieutenant-Governor in Council, came in question,[3] Weldon, J., expresses a contrary view, and says:—"There were many officers which the Governor-General had the appointment of vested in him as the Queen's representative[4] to make in the provinces, but that power may be limited by the passing of Acts by the local legislature, assented to by the Governor-General; and any Act creating an office and vesting the appointment in the Governor and Executive Council would be valid, if not disallowed by the Governor-General as provided for in the Union Act.[5] . . As the Act establishing Parish Courts has not been disallowed by the Governor-General, as directed under the 90th section of the Union Act, I am of opinion that it was within the power of the legislature to pass the Act, and the

Ganong *v.* Bayley.

Contrary view of Weldon, J.

[1] See Proposition 12 and the notes thereto.

[2] 1 P. & B. at pp. 327-8, 2 Cart. at pp. 513-4, (1877).

[3] As to this case see, also, *supra* pp. 169-70.

[4] As to this, however, see Proposition 7 and the notes thereto.

[5] As to the despatch of Lord Kimberley of February 1st, 1872, upon the power to appoint Queen's Counsel, which Weldon, J., strangely cites as having "fully recognized" the principle here enunciated by him, see *supra* p. 135.

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appointment of Commissioners by the Lieutenant-Governor properly exercised, and the Act valid." But in the same case, Allen, J.,[1] expresses views in harmony with those of Taschereau, J., in Lenoir *v.* Ritchie, above cited, as does also Drummond, J., in L'Union St. Jacque de Montreal *v.* Belisle;[2] and Cameron, J., in Regina *v.* Bennett,[3] who, however, appears to use the fact of the non-exercise of the veto power as some argument in favour of the validity of the provincial legislation in question; and so does Armour, C.J., in Regina *v.* Bush.[4]

Per Ramsay, J.

And the words of Ramsay, J., in Dobie *v.* The Temporalities Board,[5] may well be remembered in this connection:—"Without meaning to imply any sort of criticism as to the exercise of the discretion of the federal government in the disallowance of Bills, I may say that we all know that the federal government is most unwilling to interfere in a too trenchant manner with local legislation; and where there is room for doubt as to the limits of the powers exercised, and where great public interests are involved, they readily leave the question to the decision of the Courts."[6] Besides, "it is not to be expected that the Governor-General in Council will be so far able to examine all Acts passed by the provincial legislature as to foresee all possible constitutional difficulties that may arise on their

Federal government leaves much to the Courts

Nor could it foresee all constitutional objections to Acts.

[1] 1 P. & B. at p. 337, 2 Cart. at p. 525.

[2] 20 L.C.J. at p. 44, 1 Cart. at p. 92, (1874).

[3] 1 O.R. at pp. 461-2, 2 Cart. at pp. 641-2, (1882).

[4] 15 O.R. at p. 402, 4 Cart. at pp. 694-5, (1888). As to this case see *supra* pp. 137-9, 176. And see the words of Sir J. Thompson, in his report as Minister of Justice in the Quebec District Magistrates Act, 1880, quoted *supra* pp. 149, 157. See, also, his report on the New Brunswick Acts of 1889, cited in the notes to Propositions 13, 14, and 15.

[5] 3 L.N. at p. 251, 1 Cart. at p. 383, (1880).

[6] See, also, *supra* p. 198.

construction:" per Harrison, C.J., in Leprohon *v.* City of Ottawa.[1] Prop. 11

As Ritchie, C.J., says in the Queen *v.* Chandler,[2] delivering the judgment of the Supreme Court of New Brunswick:—"No power is given to the Governor-General to extend the authority of the local legislature, or enable it to override the Imperial statute, which would be the necessary result if the local legislature could, by assuming the right to legislate on a prohibited subject, have their action legalized, and validity given to their Acts by the simple confirmation of the Governor-General, thus making the individual act of the local legislature, or of the Governor-General, or their united acts, superior to the parliament of Great Britain.[3]

The Governor-General cannot extend powers of local legislatures.

[1] 40 U.C.R. at p. 490, 1 Cart. at p. 647, (1877).

[2] 1 Hann. at p. 558, 2 Cart. at p. 437, (1869).

[3] See, however, *supra* pp. 90-2.

PROPOSITION 12.

12. The powers of legislation conferred upon the Dominion Parliament and the Provincial Legislatures, respectively, by the British North America Act, are conferred subject to the sovereign authority of the Imperial Parliament.

The words of this Proposition are suggested by a passage in the judgment of Ritchie, C.J., in City of Fredericton *v.* The Queen.[1] And, in like manner, in Attorney-General of Canada *v.* Attorney-General of Ontario,[2] Boyd, C., says that:—"In relation to the supreme authority of the British parliament, Canada, in its composite character, forms a complete and separate subordinate government;" and Crease, J., in the Thrasher Case,[3] that the Imperial parliament has "an absolute and complete sovereign power."

Supremacy of Imperial parliament.

[1] 3 S.C.R. at pp. 529-30, 2 Cart. at p. 30, (1880). Cf. per Taschereau, J., S.C., 3 S.C.R. at pp. 557-8, 2 Cart. at p. 51; per Gwynne, J., S.C., 3 S.C.R. at p. 561, 3 Cart. at p. 54.

[2] 20 O.R. at p. 245, (1890).

[3] 1 B.C. (Irving) at p. 214, (1882). In the New South Wales case of Apollo Candle Co. *v.* Powell, 4 N.S.W. at p. 167, (1883), Sir J. Martin, C.J., says:—"There is no legislature within the wide bounds of the British Empire which is not in subordination to and under the control of that Imperial parliament, and which does not derive its jurisdiction from that source." And on the whole subject of the Imperial supremacy over the self-governing colonies, see Todd's Parl. Gov. in Brit. Col., 2nd ed., esp. ch. 7. For an appeal since Confederation by one of our provincial governments to the supreme jurisdiction of the Imperial parliament, see in connection with the Nova Scotia Great Seal Case, Can. Sess. Pap., 1877, No. 86, p. 16. As to this case see, also, *supra* pp. 104, n. 2, 114, n. 1, 134, n. 1.

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And so in *Ex parte* Renaud,[1] Ritchie, C.J., asserting the supreme legislative power and control of the parliament of Great Britain over colonial legislatures, refers to the Colonial Laws Validity Act, 28-29 Vict., c. 63, s. 2, (1865), as being a clear statutory recognition of such supremacy. This enactment provides that:—"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of parliament extending to the colony to which such law may relate, or repugnant to any law or regulation made under authority of such Act of parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."[2]

The Colonial Laws Validity Act.

Accordingly, in the Merchants Bank of Canada *v.* Gillespie,[3] both Strong, J., and Henry, J., expressed the view that the Dominion Winding-Up Act, 45 Vict., c. 23, (D.), would have been *ultra vires* if it had purported to include within its provisions the company in question there, which had been incorporated in England, in 1874, under the Imperial Joint Stock Companies Acts, 1862 and 1867, and had never been incorporated in Canada, the provisions of the Dominion Act being in conflict with those of the said Imperial Acts, especially those of the Act of 1862. And Strong, J., goes further, and observes[4] that if extended to such a foreign corporation the Act in

Merchants Bank *v.* Gillespie.

Per Strong, J

[1] 1 Pugs. at p. 274, 2 Cart. at p. 447, (1873).

[2] See, also, as to this Act, Reg. *v.* Brierly, 14 O.R. at p. 531, *et seq.*, 4 Cart. at p. 670, *et seq.*, (1887). And for other declarations by the parliament of Great Britain of its authority over the colonies, see Imp. 6 Geo. III., c. 12, and section 46 of the Quebec Act, 31 Geo. III., c. 31. See, also, Stokes on the Colonies, (1783), at pp. 29-30.

[3] 10 S.C.R. 312, (1885).

[4] At p. 324.

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question would be *ultra vires*, even apart from the Imperial Act, 28-29 Vict., c. 63, "upon the interpretation of the clauses as to the general powers of the Dominion parliament in the British North America Act," thus apparently indicating his view that it never was intended by section 91 of the British North America Act that the Dominion parliament should have power to enact Acts repugnant to any Imperial Act extending to Canada.

The supremacy of Imperial parliament.

Nevertheless, in Angers *v.* The Queen Insurance Co.,[1] the view that "in order to reconcile these two sections," (*sc.*, sections 91 and 92 of the British North America Act), "the word 'exclusively' must be construed as referring to the Imperial power," is mentioned by Taschereau, J., as "stated somewhere." He adds, however:—"I do not concur in this view. The word was taken from the resolutions on Confederation sent from Canada, and it was certainly not the intention to refer them to the Imperial power."[2]

Reg. *v.* Taylor.

There can be no doubt that Taschereau, J., here has reference to the views expressed by Draper, C.J., in Regina *v.* Taylor.[3] In that case, in the Court below,[4] Wilson, C.J., had expressly referred to the powers of the Dominion parliament as being "sub-

[1] 16 C.L.J. at p. 204, 1 Cart. at p. 149, (1877).

[2] No. 29 of the Quebec Resolutions commences:—"The general parliament shall have power to make laws for the peace, welfare, and good government of the federated provinces (saving the Sovereignty of England), and especially laws respecting the following subjects," etc., and concludes, "and generally all matters of a general character, not specially and exclusively reserved for the local governments and legislatures." The clause in brackets is not in the British North America Act itself, but, as Mr. Clement says, (Canadian Constitution at p. 184):—"It was no doubt deemed unnecessary to insert any words of express restriction upon this point, as it is an implied restriction upon all colonial legislation."

[3] 36 U.C.R. 183, (1875). See this case further referred to *supra* pp. 27-8, n. 1.

[4] *Ibid.*, at p. 191.

ject to the Imperial authority as declared by Imperial Act 28 and 29 Vict., c. 63, s. 3."[1] And again, as "subordinate, of course, to the Imperial parliament." But Draper, C.J., on appeal to the full Court, referring to the expression in section 91 of the British North America Act, "exclusive legislative authority" of the Dominion of Canada, says[2]:—"Exclusive of what? Surely not of the subordinate provincial legislatures whose powers had yet to be conferred, and who would have no absolute powers until they were in some form defined and granted. Would not this declaration seem rather intended as a more definite and extended renunciation on the part of the parliament of Great Britain of its power over the internal affairs of the new Dominion than was contained in the Imperial statute of 18 Geo. III., c. 12, and 28-29 Vict., c. 63, ss. 3, 4, and 5?[3] . . It appears to me that section 91 does mention some classes of subjects as belonging 'to the exclusive legislative authority' of the parliament of the Dominion which, in part at least, form part of matters coming within some class or classes of subjects, enumerated in section 92."[4] And it should be added that Strong, J., expresses his entire concurrence in this judgment of Draper, C.J., although not specifically referring to

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View of Draper, C.J., that "exclusive" in sect. 91 of B.N.A. Act refers to Imperial parliament.

[1] Possibly this is a misprint for section 2. However, section 3 provides:—"No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of parliament, order, or regulation, as aforesaid."

[2] 36 U.C.R. at p. 220.

[3] Section 4 provides that no colonial law shall be void by reason only of inconsistency with the Governor's instructions. Section 5 provides that colonial legislatures may establish, etc., Courts of law, and representative colonial legislatures may make laws respecting the constitution, powers, and procedure of such legislatures.

[4] See Proposition 41 and the notes thereto.

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the above point, while Burton and Patterson, JJ., are also mentioned as having concurred.

Case of "The Royal."

In the case of "The Royal,"[1] moreover, in the Vice-Admiralty Court, Quebec, it was held that section 189 of the Imperial Merchant Shipping Act, 1854, (17-18 Vict., c. 104), which provides that no suit for wages under £50 shall be brought by any seaman in any Court of Vice-Admiralty, unless in certain cases mentioned, had been repealed *pro tanto*, by section 56 of the Dominion Seamen's Act, 1873, (36-37 Vict., c. 104, D.), which placed the limit at $200 in the case of any seaman belonging to any ship registered in the provinces of Quebec, Nova Scotia, New Brunswick, and British Columbia, and this although section 109 of the Imperial Act enacts that that part of the Act which includes section 189 shall apply to all ships registered in any part of Her Majesty's Dominions abroad.[2]

Supposed repeal by Dominion Act of part of Imperial Merchant Shipping Act, 1854.

Holmes *v.* Temple.

And in Holmes *v.* Temple,[3] Chauveau, J., in Sessions of the Peace, Quebec, also appears to have interpreted the word "exclusive," in section 91 of the British North America Act, as meaning exclusive not only of the provincial legislatures, but of the Imperial parliament itself.

[1] 9 Q.L.R. 148, (1883). See especially at p. 151.

[2] It may be added that section 5 of the Dominion Seamen's Act, 1873, expressly provides that so much of the provisions of the Imperial Merchant Shipping Act, 1854, and of any Act of the parliament of the United Kingdom amending the same, relating to ships registered in the above four provinces of the Dominion, "as is inconsistent with this Act, shall be repealed." This Dominion Act was reserved for Her Majesty's pleasure on May 23rd, 1873, and was assented to on November 20th, 1873. Note, however, that the intended repeal was of the provisions of Imperial Acts passed prior to Confederation. And see *infra* pp. 223-30. See, also, *infra* p. 230, n. 1.

[3] 8 Q.L.R. 351, 2 Cart. 396, (1882).

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However, the Ontario case of Smiles *v.* Belford[1] is directly opposed to such a view, and the words of Draper, C.J., in Regina *v.* Taylor[2] are there expressly commented on. Smiles *v.* Belford was an application for an injunction on behalf of the holder of an English copyright under the Imperial Act, 5-6 Vict., c. 45, to restrain the defendants from publishing a reprint of the plaintiff's work in Canada. Section 15 of the Imperial Act above referred to prohibited Her Majesty's colonial subjects from printing or publishing in the colonies without the consent of the proprietor of the copyright any work in which there was copyright in the United Kingdom. By section 29 the Act was extended to every part of the British Dominions. But the point was raised in this case, or at all events suggested,[3] though, as it would appear, afterwards abandoned by counsel on the argument before the Court of Appeal,[4] that the Imperial parliament by No. 23 of section 91 of the British North America Act, had divested itself of all power respecting British copyright in Canada, and that the Canada Copyright Act, 1875, 38-39 Vict., c. 53, had superseded the Imperial Copyright Act above mentioned, and required all authors desirous of obtaining copyright in Canada to print and publish and register under the Act, which the plaintiffs had not done. But Proudfoot, V.C., repudiated such a view, and granted the injunction asked for. He says[5]:—"There is nothing indicating any intention of the Imperial parliament to abdicate its

Smiles *v.* Belford opposed to such a view.

Copyright.

Per Proudfoot, V.C.

[1] 23 Gr. 590, 1 O.A.R. 436, 1 Cart. 576, (1876).

[2] 36 U.C.R. 183.

[3] 1 O.A.R. at pp. 446-7, 1 Cart. at pp. 582-3.

[4] 1 O.A.R. at p. 444, 1 Cart. at pp. 579-80.

[5] 23 Gr. at p. 602, 1 Cart. at p. 589.

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power of legislating on matters of this kind. The parliament of Canada is authorized to make laws, 'for the peace, order,[1] and good government of Canada.' The 14 Geo. III., c. 83, s. 12, enabled the Council to be appointed under that Act, 'to make ordinances for the peace, welfare, and good government of the 'province of Quebec,' and the 31 Geo. III., c. 31, created a legislative assembly in Upper Canada and in Lower Canada with power 'to make laws for the peace, welfare, and good government thereof.' And the 3-4 Vict., c. 35, s. 3, which united the provinces, gave to the legislative council and assembly of Canada power in similar terms to make laws for the 'peace, welfare, and good government' of Canada. Under these earlier Acts it was never contended,—at all events it is not now contended,—that the provincial legislature could make laws at variance with those which the Imperial parliament might choose to pass, and declare to have effect throughout the British dominions; and the language of the 91st section of the last Act has no more ample phrases to indicate larger powers. The legislature of Canada since the British North America Act recognizes the previous Imperial legislation on the subject of copyright as still in force in Canada," citing 31 Vict., c. 7, Sch. C., and 31 Vict., c. 56. On appeal to the Ontario Court of Appeal this decision was affirmed. Bur-

Imperial parliament has not abdicated its powers of legislating on such subjects as copyright.

[1]The significance of the word "order" here, which, it will be observed, does not occur in the other Acts referred to, is worthy of special notice. It places in the hands of the Federal power of the Dominion the right and responsibility of maintaining public order throughout the whole country. The want of a similar provision in the constitution of the United States has been described as "the capital defect of the American constitution," "where the preservation of law and order is not primarily and directly the affair of the government of the United States": *The Spectator*, for July 14th, 1894. The difficulties and dangers resulting therefrom were illustrated by the great railway strike disturbances in Chicago in the summer of 1894. See, also, 14 C.L.T. at pp. 86, 219.

ton, J.A., said[1] he entirely concurred in the view of Proudfoot, V.C., and referred to Routledge *v.* Low,[2] in which it had been unsuccessfully contended that inasmuch as Canada had a legislature of her own and was not directly governed by legislation from England, she was not included in the general words of section 29 of the Imperial Act, 5-6 Vict., c. 45, whereby that Act was extended to every part of the British dominions. And as to the words of Draper, C.J., in Regina *v.* Taylor,[3] he observes[4] that they were wholly unnecessary to the decision of that case, and were not concurred in by other members of the Court, and that what the British North America Act "intended to effect was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the parliament of Canada, as distinguished from the provincial legislatures, in the same way as it has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the local legislatures, and placed them under the exclusive jurisdiction and control of the Dominion. I entirely concur with the learned Vice-Chancellor in the opinion he has expressed, that under that Act no greater powers were conferred upon the parliament of the Dominion to deal with this subject than had been previously enjoyed by the local legislatures."[5]

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Per Burton, J.A.

Criticises view of Draper, C.J.

So, likewise, Moss, J. A., says[6]:—"It must be taken to be beyond all doubt that our legislature had

[1] 1 O.A.R. at p. 443, 1 Cart. at p. 578, (1877).

[2] L.R. 3 H.L. 100, (1868).

[3] *Supra* p. 211.

[4] 1 O.A.R. at p. 442, 1 Cart. at p. 578.

[5] As to the interpretation of No. 23 of section 91 of the British North America Act, see further *infra* pp. 223-4, n. 2; and p. 231, n. 1.

[6] 1 O.A.R. at p. 447-8, 1 Cart. at p. 583-4.

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no authority to pass any laws opposed to statutes which the Imperial parliament had made applicable to the whole Empire. . . The Canadian Copyright Act of 1875, if adopted by the two branches of the legislature and assented to by the Crown in the usual manner, would have been wholly powerless to abridge his," (*sc.*, the plaintiff's), "existing right. He would still have been entitled by virtue of his British copyright to restrain any Canadian reprint." And as to Draper, C.J.'s, dicta, he says[1]:—"I believe that his lordship did not deliberately entertain the opinion which these expressions have been taken to intend. He simply threw out a suggestion in that direction, but further consideration led him to adopt the view that the Act did not curtail the paramount authority of the Imperial parliament, but merely conferred exclusive jurisdiction upon the Dominion parliament as between itself and the provincial legislatures."

So, also, per Moss, J.A.

So, also, per Gray, J.

So, again, in the British Columbia case of Tai Sing *v.* Maguire,[2] Gray, J., after remarking that it is difficult to see the foundation for the conclusion at which Draper, C.J., arrived in Regina *v.* Taylor, continues:—"The British North America Act, 1867, was framed, not as altering or defining the changed or relative positions of the provinces towards the Imperial government, but solely as between themselves. It was a written compact by which, for the future, their mutual relations were to be governed. In consideration of the concessions of the provinces to the general government, and for the purpose of enabling the latter to carry out the responsibilities assumed on behalf of the former,

Tai Sing *v.* Maguire.

[1] 1 O.A.R. at pp. 447-8, 1 Cart. at pp. 583-4.

[2] 1 B.C. (Irving) at p. 107, (1878).

each restricted itself as to what for the future it would do. And it is to be observed that the expressions used in the 92nd section, though not identical in words, are identical in meaning with those used in section 91. In section 91, the Dominion parliament has 'exclusive legislative authority'; in section 92 the provincial legislature may 'exclusively make laws' touching the matters assigned to each. The exclusiveness in the latter could certainly have no reference to legislation by the Imperial parliament, because it would be incongruous, and if in the former it was intended as restricted to Imperial legislation, the mutuality in the compact was gone, and the provinces were obtaining nothing for the concessions they gave.[1] Moreover, with reference to the Imperial parliament, as a paramount or sovereign authority, it could not be restrained from future legislation, and, therefore, in that light the term would have no legal bearing. Such a construction weakens the authority of the general parliament of the Dominion. The British North America Act of 1867 was intended to make legal an agreement, which the provinces desired to enter into as between themselves, but which, not being sovereign states, they had no power to make. It was not intended as a declaration that the Imperial government renounced any part of its authority. It is submitted, with deference to that great and good Canadian, Chief Justice Draper, that the original framers of Confederation meant that Act to be the rule of guidance as between the Dominion and provincial governments. It is the charter of

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Criticizes view of Draper, C.J.

Supremacy of Imperial parliament.

[1]The meaning here evidently is that each province gave up the right to legislate on the subjects assigned to the Dominion parliament, in consideration of all the other confederated provinces doing likewise.

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their relative rights; if not, the Act is a great bungle."[1]

Per Dorion, C.J.

And so in *Ex parte* Worms,[2] speaking of the Imperial Extradition Act of 1870, Dorion, C.J., says:—"The Act of 1870 is not inconsistent with section 132 of the British North America Act of 1867, and, if it were, the last Act should prevail."

Reg. *v.* College of Physicians.

And in Regina *v.* The College of Physicians and Surgeons of Ontario,[3] the Ontario Court of Queen's Bench held that the Imperial Medical Act passed in 1868 applied to Canada, and overrode the provisions of the provincial Act of 1874 as to the examination of applicants for registration as medical practitioners in Ontario, although the subject of education is placed within its exclusive jurisdiction by the British North America Act. Hagarty, C.J., delivering judgment, says[4]:—"The case on behalf of the defendants was argued by Mr. Crooks in a very fair and candid spirit, admitting, as of course was necessary, with the Federation Act before us, that if the Imperial parliament distinctly legislate for us they can do so, notwithstanding any previous enactment or alleged surrender of the power of exclusive legislation on any subject. But it was ably urged that as the subject of education was one in which the exclusive right was given to this province, we should read the subsequent Imperial Act as not interfering with the right so granted. To this it may be argued that where the Federation Act speaks of any such exclusive right, it means exclusive as opposed to any attempt to legislate by

Per Hagarty, C.J.

[1] See Propositions 1 and 2, and the notes thereto.

[2] 22 L.C.J. at p. 111, 2 Cart. at p. 315, (1876).

[3] 44 U.C.R. 564, 1 Cart. 761, (1879).

[4] 44 U.C.R. at p. 576, 1 Cart. at pp. 774-5.

the Dominion parliament. But it appears to us that the language of the Imperial Act already cited," (being the Act in question), "is too clear for dispute." Prop. 12

As to the point here referred to, of not construing Imperial Acts as intended to apply to the self-governing colonies, unless expressly so stated, the words of VanKoughnet, C., in the ante-Confederation case of Penley *v.* The Beacon Assurance Co.,[1] may be cited. He there says:—"While I admit the power of the Imperial legislature to apply by express words their enactments to this country, I will never admit that, without express words, they do apply, or are intended to apply. A constitutional government such as we have been liberally given by our Sovereign is an *imperium in imperio*, which, we know, the higher power interferes with as little as possible. We are entrusted with all the work of local self-government, with the creation and punishment of offences, with the establishment and maintenance of rights, personal and otherwise, with the construction and constitution of Courts, and the regulation of their jurisdiction and procedure. We cannot, then, suppose that the Imperial parliament, in conferring in general terms new powers or jurisdiction upon Her Majesty's Courts, mean to touch the Courts in Canada. Every year witnesses in the legislature of England some change in the law. The statute containing it does not say in express terms that it shall not extend to the colonies, and is confined to Great Britain; but surely, notwithstanding that omission, no one would for a moment suppose it in force here." And, therefore, he laid down that the 68th section of the Imperial Act, 7-8 Vict., chapter 110, which provided a summary

Penley *v.* Beacon Assurance Co.

Intention of Imperial Act to apply to self-governing colonies must be clearly expressed.

Application of Imperial Act conferring new powers on Courts of law.

[1] 10 Gr. 422, at p. 428, (1864).

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proceeding whereby a creditor of any company incorporated thereunder, who had obtained a judgment or decree establishing his claim against the company, and failed to realize the same, might call on any shareholder or shareholders of the company, as representing the company and liable for its acts, by motion or otherwise, according to the practice of the various Courts, to pay his claim, did not apply to the Courts of this country so as to give them jurisdiction to entertain such an application by a creditor against shareholders, resident in this country, of a company incorporated under the above Imperial Act.

Sir G. C. Lewis' "Government of Dependencies"

To return to the subject of the paramount authority of the Imperial parliament, some passages referring to it in Sir Cornewall Lewis' Essay on the Government of Dependencies are of interest. Thus, after speaking of the relation subsisting at the time he wrote, (*sc.*, 1841), between the governments of Hungary and Austria, he says[1]:—"Some writers have maintained that the English colonies in America and the West Indies are connected with England by a political relation similar to that just described. They have asserted that the English parliament is not supreme in any of these colonies; and that a law can only be made therein by a body composed of the English king and the local legislature of the colony. According to this view, the colonial local legislature is not subordinate to, but co-ordinate with the English Houses of Parliament; and the local legislature occupies in the colony the same position with respect to the Crown which the Houses of Parliament occupy with respect to it in England. It follows, of course,

[1]Ed. 1891, by C. P. Lucas, at pp. 91-2.

from this view that the English colonies in which this system of government obtains are not Dependencies of England." This view, however, Sir G. C. Lewis declares to be erroneous.[1] And Mr. C. P. Lucas, the able editor of the recent edition of the Essay, similarly lays it down[2]:—"The Imperial parliament, consisting of the Sovereign, Lords, and Commons, is supreme over all the colonies, whether or not possessing responsible government, and can make laws upon any subject binding them or any of them. . . In practice this paramount power of legislation by the Imperial parliament is only exercised by Acts conferring constitutional powers, or dealing with a limited class of subjects of special Imperial or international concern, such as merchant shipping and copyright. It is, therefore, generally speaking, left to the Crown or to the local legislatures to make laws, as Parliament can, when it thinks fit, make its views upon any colonial question known to the Crown by resolution."

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Affirms supremacy of Imperial parliament.

As does, also, Mr. C. P. Lucas.

And so in a despatch of October 18th, 1875, to the Governor-General,[4] Lord Carnarvon concurs with the representations in an Address to the

Lord Carnarvon.

[1] See at pp. 155-6, where he refers to Lord Mansfield as stating the supremacy of Parliament in a British Dependency in his celebrated judgment in Campbell *v.* Hall, 20 How. St. Tr. 239, (1774); and in two notes at the end of the Essay, he mentions Bryan Edward's History of the West Indies, Vol. 2, pp. 420-30, 435-6, and Haliburton's History and Statistical Account of Nova Scotia, Vol. 2, p. 346, as places where the "erroneous" view is affirmed that "there are certain subjects in which the local government of an English Dependency is legally, as well as practically, supreme."

Campbell *v.* Hall.

[2] App. 1, at p. 331.

[3] Cf. the words of Professor Dicey, *supra* p. 203. To the above authorities may be added Tarring's Law of the Colonies, 2nd ed., at pp. 33-4; and Metherell *v.* The Medical Council of British Columbia, 2 B.C. (Cassidy) at p. 189, (1892).

[4] Hodgins' Prov. Legisl., Vol. 1, p. 12.

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Queen, voted by the House of Commons of Canada, on the subject of the New Brunswick School Act of 1871, that:--"Legislation by the Imperial parliament, curtailing the powers vested in a province by the British North America Act would be an undue interference with the provincial constitutions and with the terms on which the provinces consented to become members of the Dominion."

Imperial parliament does not now interfere with local affairs of self-governing colonies.

And in Hodge *v.* The Queen,[1] Burton, J.A., says:—"The Imperial parliament has the power, no doubt, to pass laws such as those passed by the local legislatures and affecting all Her Majesty's subjects in the province, but it is equally clear that it is a power existing in name only, and one which it would never attempt to exercise, and therefore the parliament of the province cannot in that sense be spoken of as exercising a delegated authority." To which may be added the words of Sir John Thompson, in his report to the Governor-General of August 3rd, 1889, in reference to the Dominion Copyright Act of 1889,[2] presently to be referred to more at large:—"It has never been claimed that the powers of the parliament of Canada are exclusive of the powers of the parliament of Great Britain, and nobody can doubt that the parliament of Great Britain can at any time, (limitations of good faith and national honour not being considered), repeal or amend the British North America Act, or exercise, in relation to Canada, its legislative powers over the subjects therein mentioned. Subject to the same limitations, Her Majesty's government can, of course, disallow any Act of the parliament of Canada. It is respectfully

So per Sir John Thompson.

[1] 7 O.A.R. at p. 278, 3 Cart. at p. 182, (1882).

[2] Dom. Sess. Pap. 1890, Vol. 15, No. 35, p. 8.

submitted that the Canadian parliament, except as to the control which may be exercised by the Imperial parliament by a statute subsequent to the British North America Act, and except as to the power of disallowance, possesses unlimited power over all the subjects mentioned in the 91st section, and that it is necessary that it should do so for the well-being of Canada, and for the enjoyment of self-government by its people." Prop. 12

It will be observed that Sir J. Thompson, in speaking of the control exercised by the Imperial parliament, refers only to statutes passed by it subsequently to the British North America Act. This is significant of the contention pressed by him in this report, that it is in the power of the Dominion parliament, and the provincial legislatures, respectively, to repeal Imperial statutes passed prior to the Confederation Act, and dealing with any of the subjects within the legislative powers granted to them by that Act. This contention Mr. Bourinot has stated, in some recent Articles on Federal Government in Canada, was directly raised for the first time in the debates in the Dominion parliament on the Quebec Jesuits' Estates Act.[1] Mr. Bourinot says:—"It must be here mentioned that the Imperial government refused its assent to the Canadian Copyright Act of 1872 because it was repugnant, in the opinion of the law officers of the Crown, to the provisions of an Imperial statute of 1842, 5-6 Vict., chapter 45, extending to the colony.[2]

His contention as to Canadian power to repeal ante-Confederation Imperial legislation in Canadian local matters.

Mr. Bourinot.

[1] 9 C.L.T. at pp. 193, 198, *et seq.* See, also, Todd's Parl. Gov. in Brit. Col., 2nd ed. at p. 502, *et seq.*, where the passage from Sir J. Thompson's speech, referred to by Mr. Bourinot, is quoted.

[2] Dom. Sess. Pap., 1875, No. 28. Lord Carnarvon, in his despatch to the Governor-General of June 15th, 1874, here referred to, says:—"The Imperial Copyright Act, 5-6 Vict., chapter 45, is, as you are aware, still in force in its integrity throughout the British dominions

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On the other hand, in the debate on the constitutionality of the Quebec Jesuits Bill it was contended by the Minister of Justice that a provincial legislature 'legislating upon subjects placed under its jurisdiction by the British North America Act has the power to repeal an Imperial statute passed prior to the British North America Act affecting those subjects:' (Can. Hans., March 27th, 1889). In support of this position, he referred to three decisions of the Judicial Committee of the Privy Council. One of these, Harris *v.* Davies,[1] held that the legislature of New South Wales had power to repeal a statute of James I. with respect to costs in case of a verdict for slander. The second case was that of the Apollo Candle Co.,[2] in which the principles laid down in Regina *v.* Burah[3] and in Hodge *v.* Reginam[4] were affirmed. The third and most important case as respects Canada was Riel *v.* Reginam,[5] in which it was practically decided that the Canadian parliament had power to pass legislation, changing or repealing (if necessary) certain statutes passed for the regulation of the trial of offences in Rupert's Land before it became a part of the Canadian domain. This contention is

This contention first raised in debate on Jesuits' Estates

The decisions on which it is rested.

in so far as it prohibits the printing in any part of such dominions of a book in which there is subsisting copyright under that Act, without the assent of the owner of the copyright." And of the British North America Act, he says, its effect is "to enable the parliament of Canada to deal with colonial copyrights within the Dominion, but it is clear it was not contemplated to interfere with the rights secured to authors by the Imperial Act of 5-6 Vict., c. 45, or to override the provision of that Act." See, also, Dom. Sess. Pap., 1890, Vol. 15, No. 35, at p. 2 ; and *infra* p. 231, n. 1.

[1] 10 App. Cas. 279, (1885).

[2] 10 App. Cas. 282, 3 Cart. 432, (1885).

[3] 3 App. Cas. 889, 3 Cart. 409, (1878).

[4] 9 App. Cas. 117, 3 Cart. 144, (1883).

[5] 10 App. Cas. 675, 4 Cart. 1, (1885).

thus directly raised for the first time, but it is not supported by the several authorities who have referred to the relations between the parent state and her Dependencies. The question is too important to be treated summarily in this brief review, especially as it will come up formally in connection with the Copyright Act of 1889, in which the same conflict as in 1875 arises."[1] Prop. 12

The weight of authority is against it.

On February 10th, 1890, a Return was made to the Dominion parliament of the correspondence which had taken place between the Dominion and Imperial authorities with reference to this Copyright Act of 1889, 52 Vict., c. 29, (D.).[2] It opens with a memorial transmitted by the Colonial Office from the English Copyright Association and the Musical Copyright Association, claiming that the Act was *ultra vires*, and asking the Imperial authorities to withhold the royal assent. This memorial quotes the Opinion of Sir Roundell Palmer, and Sir Farrer Herschell, given to the Copyright Association in reference to the Canadian Copyright Act of 1868. In this Opinion these eminent lawyers state:—"It is abundantly clear that the provision in the Act of the Imperial legislature, 30-31 Vict., c. 3, by which the Dominion of Canada was constituted, declaring that the exclusive legislative authority of the Dominion parliament extends (amongst other things) to copyrights, has reference only to the exclusive jurisdiction

The correspondence with Imperial government over Canadian Copyright Act, 1889.

Opinion of Sir Roundell Palmer (Lord Selborne).

"Exclusive" in section 91 of B.N.A. Act

[1] Mr. Bourinot cites against the contention in question, Hearn's Government of England, Appendix 2, where, (at p. 597), it is stated that, shortly after its creation, the parliament of the Australian colony of Victoria, in an Act consolidating the law of evidence, assumed to repeal certain Imperial Acts containing provisions relating to the admission of evidence in any Court of law in Her Majesty's dominions, and afterwards on the Colonial Office objecting to the Act on this ground, though it was not disallowed, repealed it, thus admitting that it had exceeded its powers.

[2] Dom. Sess. Pap., 1890, Vol. 15, No. 35. There are subsequent returns, *ibid.*, 1892, Vol. 12, No. 81, and 1894, No. 50.

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in Canada of the Dominion legislature as distinguished from the legislatures of the provinces of which it is composed;" and they held that the Copyright Act of the Dominion parliament of 1868, 31 Vict., c. 54, gave a copyright throughout Canada to works published in any part of the Dominion, but that it was not competent to, and did not, affect the protection against piracy afforded by the Imperial Act throughout the whole British dominions in respect of works published in the United Kingdom.[1]

Has reference to powers of provincial legislatures

In his report to the Governor-General of August 3rd, 1889, included in this Return, Sir John Thompson observes, after stating that the Copyright Act of 1889, being the Act in question, was understood not to conflict in any way with any Imperial legislation passed since the adoption of the British North America Act :—" The remaining question, therefore, simply is as to the right of the parliament of Canada under the British North America Act to make regulations in Canada regarding copyright in Canada, notwithstanding that these regulations may differ from those existing under Imperial legislation adopted prior to the British North America Act. The view which the undersigned respectfully presents is that as regards all those subjects in respect to which powers were given to the Canadian parliament by the British North America Act, the true construction of the British North America Act is that Parliament may properly legislate without any limitation of its competency excepting the limitation which Her Majesty can always impose by disallowance, (whether the Act be within the power of parliament or not), and excepting also as to control by Imperial legislation subsequent to the British North America Act and applicable to Canada. As to this latter it may be considered, in

Sir J. Thompson's report on Copyright Act of 1889.

Contends for power to repeal ante-Confederation Imperial legislation as to copyright in Canada.

[1] See, also, *infra* p. 231, n. 1.

so far as it deals with the subjects given to the parliament of Canada, as amendatory of the British North America Act." He then refers in support of his view to the cases mentioned by Mr. Bourinot in his article referred to above, and also mentions a despatch of Lord Carnarvon of June 15th, 1874, with reference to the Dominion Copyright Act of 1872, which stated that he had been unable to advise Her Majesty to assent to the Act, and that the effect of the British North America Act was "to enable the parliament of Canada to deal with the colonial copyrights within the Dominion," and that "it is clear that it was not contemplated to interfere with the rights secured to authors by the Imperial Act of 5-6 Vict., c. 45, or to override the provisions of that Act,"[1] remarking:—"The opinion of Lord Carnarvon seems to have been based on a strict view taken of the Imperial statute known as the Validity of Colonial Laws Act, 28-29 Vict., c. 63, which declared that colonial statutes should be void and inoperative if they should be repugnant to the provisions of any Act of parliament extending to the colonies, or repugnant to the provisions of any order or regulation made under the authority of such Act, and having in such colony the force and effect of such Act. There may be grounds for argument that, as the British North America Act was passed subsequently to the statute, it confers a constitution more liberal than those to which the statute applied. Another view which may be urged is, that the repugnancy, in order to have the effect indicated, must exist in relation to some statute passed after the creation of the legislature of a colony. The statute does not seem, certainly, to have been construed by the judicial decisions in the manner

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Refers to Lord Carnarvon's despatch as to Canadian Copyright Act of 1872.

And the Colonial Laws Validity Act.

[1] See *supra* p. 223, n. 2.

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indicated by Lord Carnarvon. If the view which his lordship takes is correct, it will be impossible for the parliament of Canada to make laws in regard to any one of the twenty-one subjects which constitute the 'area' of the Canadian parliament, (to adopt the phrase used in the decision of Hodge *v.* The Queen in relation to the Ontario legislature[1]), when such legislation is repugnant to any legislation which existed previously, applicable to these subjects in the colonies. There undoubtedly did exist Imperial legislation as regards all those subjects in the colonies at a time long anterior to the gift of representative institutions, and it was never supposed to be necessary that Canada, or the provinces now constituting Canada before the Union, should obtain the repeal of that legislation by the Imperial parliament, before they proceeded to adopt such measures as became necessary, from time to time, in the government of the country. It is respectfully submitted that, in respect to all these subjects, the parliament of Canada must be considered to have the plenary powers of the Imperial government (to quote the words of the Judicial Committee), subject only to such control as the Imperial government may exercise from time to time, and subject also to Her Majesty's right of disallowance, which the British North America Act reserves to her, and which, no one doubts, will always be exercised with full regard to constitutional principles and in the best interests of the Empire when exercised at all."

Plenary powers of Dominion parliament.

A Return of further correspondence was made to Parliament in 1892,[2] from which it appears that in July, 1890, Sir John Thompson had an opportunity

[1] See 9 App. Cas. at p. 132, 3 Cart. at p. 162.

[2] Dom. Sess. Pap., 1892, Vol. 12, No. 81. See, also, *ibid.*, 1894, No. 50, and *infra* p. 231, n. 1.

of urging his views in personal conversation with Lord Knutsford, Secretary of State for the Colonies, and in a report to the Governor-General of December 15th, 1890, he says, referring to this conversation:—"Lord Knutsford was unfavourable to the view which I had put forward, as to the powers of the parliament of Canada, in my report to your Excellency dated August 3rd, 1889. This matter formed the ground of much argument between his lordship and myself, resulting in neither party changing his opinion. Lord Knutsford concluded the discussion by remarking that unless the constitutional question should be decided in our favour by the Judicial Committee of the Privy Council, he thought it would not be practicable to get the British parliament to pass an Act to set the colonies free as to legislation on the subject of copyright."[1] Prop. 12 Lord Knutsford's view.

Conceding, however, Sir J. Thompson's contention to be unsound, the fact remains that it is difficult to draw any essential distinction between holding the great self-governing colonies to the provisions of Imperial Acts extending to them, but passed prior to the grant of self-government, and the Imperial parliament now passing an Act of the same character embracing such colonies within its scope. The exercise of Imperial authority is as strong in the one case as in the other. On the other hand, there would appear to be nothing to show that in conferring self-governing powers upon the colonies, it ever was the intention of the Imperial Crown and Parliament to lessen or detract from the right The position of the matter.

[1] It appears, from the statements made on February 7th, 1895, by Sir Mackenzie Bowell, the Premier, and Sir C. H. Tupper, the Minister of Justice, to a deputation of members of the Copyright Association of Canada, that their government was fully resolved to adhere to the contention as to the powers of the Dominion parliament raised by Sir J. Thompson: (reported in *The Daily Mail and Empire* of February 8th, 1895).

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of the latter to include such colonies within the scope of an Imperial Act extending to them, upon any subject, save only taxation for the purpose of raising a revenue, in respect to which the Declaratory Act, 18 Geo. III., c. 12, is, of course, explicit. But the policy of such legislation, and how it would now be regarded by the inhabitants of the colonial possessions affected by it, is a different question.[1]

Whence comes power over such Imperial Acts as the Statutes of Elizabeth?

In conclusion, a question may present itself to the mind as to how it is that a colonial legislature can have power to amend or repeal in respect to the colony an Imperial statute such as the well-known statutes of 27 Eliz., c. 4, and 13 Eliz., c. 5, the former of which, for example, purports to be amended, and the meaning of the latter declared by Ontario Acts. In Sir George Cornewall Lewis' Essay on the Government of Dependencies[2] a theory and explanation is advanced on the point as follows:—"In an English Dependency which has been colonized by Englishmen, the laws of the mother country are in force so far as they suit the condition of the colony; and an English Dependency acquired by treaty or conquest retains generally the laws which it possessed at the time of the acquisition. But the laws just mentioned are not considered as being among the laws of the supreme government, which the subordinate government

Sir G. C. Lewis' explanation.

[1] See Dicey's Law of the Constitution, 3rd ed., p. 102, who remarks:—"No Victorian Act would be valid that legalized the slave trade in the face of 5 Geo. IV., c. 113, which prohibits slave trading throughout the British dominions; nor would Acts passed by the Victorian parliament be valid which repealed, or invalidated, several provisions of the Merchant Shipping Acts meant to apply to the colonies, or which deprived a discharge under the English Bankruptcy Act of the effect which in virtue of the Imperial statute it has as a release from debts contracted in any part whatever of the British dominions. No colonial legislature, in short, can override Imperial legislation which is intended to apply to the colonies." See, also, per Proudfoot, V.C., *supra* pp. 213-4; also, see *supra* p. 212.

[2] Ed. 1891, at p. 201.

cannot alter; probably because they are considered to have been established directly by the express or tacit authority of the immediate government of the Dependency, although they were so established with the tacit consent of the supreme government. The laws of the supreme government, which, according to the English practice, the subordinate government is unable to alter, are the written laws of the supreme government which apply explicitly to the Dependency, and were, therefore, passed at the time or subsequent to its colonization or acquisition, or they are the written laws of the supreme government passed before or after its colonization or acquisition, which apply to the Dependency by a general description."[1] Prop. 12

[1]By way of supplement to what is above stated in reference to copyright laws (*supra* pp. 225-30), it may be added that in a Return to Parliament in 1894, (Dom. Sess. Pap., 1894, No. 50), is printed the report of the departmental representatives (of the colonial office, foreign office, board of trade, and parliamentary counsel's office) appointed to consider the Dominion Copyright Act of 1889, and this report states (at p. 7):—"On January 5th, 1889, the law officers advised that, in their opinion, the then existing powers of colonial legislatures to pass local laws on the subject of copyright in books were probably limited to enactments for registration and for the imposition of penalties with a view to the more effectual prevention of piracy, and to enactments within sub-section 4 of section 8 of the International Copyright Act, 1886, with reference to works first produced in a colony." And at p. 10, it is also stated:—"On the question of the competency of the Canadian parliament to pass the Act of 1889, Lord Knutsford took the opinion of the law officers of the Crown, who reported on December 31st, 1889, that in their opinion the powers of legislation conferred on the Dominion parliament by the British North America Act, 1867, do not authorize that parliament to amend or repeal, so far as it relates to Canada, an Imperial Act conferring privileges within Canada, and that, in their opinion, Her Majesty should withhold her assent to the Canadian Act of 1889. On the 25th of March, 1890, Lord Knutsford sent a despatch to Lord Stanley of Preston, the Governor-General of Canada, in which he expressed his regrets that he was unable to authorize the Governor-General to issue a proclamation to bring the Canadian Act of 1889 into force. Lord Knutsford referred to the advice of the law officers as to the competency of the Dominion parliament to pass the Act." It may be further added that in this despatch of March 29th, 1890, which the writer has seen, special reference is made to the decision in Smiles *v.* Belford, mentioned *supra* pp. 213-16.

PROPOSITIONS 13, 14, AND 15.

13. The power of the Imperial Parliament in the matter of the creation and distribution of colonial legislative powers is supreme, and no Colonial Secretary has *ex officio* a right by a despatch, or otherwise, either to add to, alter, or restrain any of the legislative powers conferred by the British North America Act, or indeed by any Act, or to authorize a subordinate legislature to do so.

14. The declarations of the Dominion Parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribûtion of legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered. And the same applies *a fortiori* where the Provincial Legislatures have by their legislation shown agreement in the views of the Dominion Parliament as to their respective powers. In like

manner, the views acted upon by the great public departments, as expressed in Imperial despatches, or otherwise, carry weight in the absence of judicial decision. Prop. 13-5

15. It is clear that if the Dominion Parliament or a Provincial Legislature do not possess a legislative power, neither the exercise nor the continued exercise of a power not belonging to them can confer it, or make their legislation binding.

These three Propositions are so closely connected that they may well be considered together. The first is derived from words of Henry, J., in Lenoir *v.* Ritchie,[1] and may now seem, perhaps, to be too obvious to need enunciation.[2] However, in this same case, Sir William Young, Chief Justice of Nova Scotia, had expressed a different view. The question raised was as to the constitutionality of certain Acts of the province of Nova Scotia, authorizing the Lieutenant-Governor to appoint Queen's Counsel, and to issue Letters Patent settling their precedence at the Bar, and Sir W. Young, in his judgment, refers to the correspondence which had taken place between the government of Canada and the Secretary of State for the Colonies as to the power of Lieutenant-Governors to appoint Queen's Counsel,[3] and especially to the despatch of Lord Kimberley of February 1st, 1872, already

Lenoir *v.* Ritchie.

Sir W. Young expresses views opposed to Prop. 13.

[1] 3 S.C.R. at p. 612, 1 Cart. at page 518, (1879).

[2] For an interesting account of the early constitutional relations between England and the colonies or plantations, see Pownall on the Colonies, (ed. 1768), at p. 46, *et seq.*, and see esp. at p. 64.

[3] See Dom. Sess. Pap., 1873, No. 50.

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mentioned,[1] to the effect that a provincial legislature could confer such power on the Lieutenant-Governor, and could regulate the precedence in the provincial Courts of such Queen's Counsel and of those appointed by the Governor-General, respectively, and observes:—"It is urged that the 20th and 21st chapters of the provincial Acts of 1874," (being the Acts in question), "are *ultra vires*, and the appointments under them invalid and of no effect. But the Crown, through its Secretary of State, having authorized such enactments, and the Acts having gone into operation, this contention is quite untenable."[2]

But the Supreme Court judges support it.

Two other Nova Scotia judges concurred with this judgment of Sir W. Young, but, on appeal,[3] Henry, Taschereau, Gwynne, JJ., agreed in holding the Acts in question to be *ultra vires*, and Taschereau, J., says[4]:—"An interpretation of the law in a despatch from Downing Street is not binding on this or any Court of justice, and not given as such. . . . How could any officer, either here or in England, give to the provincial legislatures other powers than those they have by the Imperial Act, or authorize the Lieutenant-Governors, or any one else, to appoint Queen's Counsel in Her Majesty's name, or give to provincial legislatures the right to so authorize their Lieutenant-Governors?"

Per Taschereau, J.

Yet views expressed in Imperial despatches are of great weight.

Nevertheless, as pointed out in the last clause of Proposition 14, the views acted upon by the great

[1] *Supra* at p. 135. It stated the opinion of the law officers of the Crown on the subject.

[2] 2 R. & C. 466-7, 1 Cart. 548-9. This despatch of Lord Kimberley is also referred to by Weldon and Allen, JJ., in Ganong *v.* Bayley, 1 P. & B. at pp. 327, 337, 2 Cart. at pp. 513, 525. And generally as to this matter of the appointment of Queen's Counsel, see *supra* pp. 88, 133-5.

[3] 3 S.C.R. 575, 1 Cart. 488.

[4] 3 S.C.R. at p. 625, 1 Cart. at p. 532.

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public departments, as expressed in Imperial despatches, or otherwise, carry weight; and so in Mercer *v.* The Attorney-General for Ontario,[1] Taschereau, J., himself, after citing from several such despatches bearing upon the question of how far Lieutenant-Governors can be said to represent Her Majesty, observes:—"I do not cite these documents as conclusive evidence for a Court of justice, but as worthy of consideration, and to show that the Imperial authorities and Her Majesty herself consider the Lieutenant-Governors as not generally representing the Sovereign."[2] And, in like manner, in Citizens' Insurance Company *v.* Parsons,[3] Fournier, J., referring to the views he had been expressing on the matters there in question, said:—"The most important public departments, such as the department of Justice, and the department of Finance, have, for some years past, adopted this view of the law, by seeing that the requirements of the several federal laws relating to insurance were strictly complied with. Such an interpretation could not prevail, no doubt, against a judicial decision; but, in the absence of the latter, the interpretation given by the departments must have great weight."

And so per Taschereau, J.

And per Fournier, J.

And so, speaking of the American constitution, Mr. Bryce says[4]:—"It is an error to suppose that the judiciary is the only interpreter of the constitution, for a large field is left open to the other authorities of the government, whose views

The American constitution.

[1] 5 S.C.R. at p. 673, 3 Cart. at p. 55, (1881).

[2] As to how far Lieutenant-Governors represent the Sovereign, see Proposition 7 and the notes thereto.

[3] 4 S.C.R. at pp. 279-80, 1 Cart. at p. 309.

[4] American Commonwealth (two-volume edition), Vol. 1, at p. 365

Prop. 13-5 need not coincide, so that a dispute between those authorities, although turning on the meaning of the constitution, may be incapable of being settled by any legal proceeding;" words which might be also applied to our own constitution.

The judiciary are not the only interpreters of the Constitution.

Proposition 14.

The first clause of Proposition 14 is from the judgment of the Privy Council in Citizens' Insurance Company *v.* Parsons,[1] where their lordships refer in a marked way to certain Acts of the Dominion parliament in which the power of the provinces to incorporate insurance companies for carrying on business within the provinces is explicitly recognized, pointing out that such recognition is directly opposed to the contention raised by counsel in that case, that by No. 11 of section 92 of the British North America Act, the "incorporation of companies with provincial objects," is meant companies with "public" provincial objects, so as to exclude insurance and commercial companies.[2] And in the same case in the Supreme Court of Canada,[3] Fournier, J., says:—"We may fairly presume that the agreement of both legislatures to keep within the limit of their respective powers affords a strong

Recognition of provincial powers by Dominion parliament.

Per Fournier, J.

[1] 8 App. Cas. at p. 116, 1 Cart. at p. 281, (1881). As Burton, J.A., says in *In re* Grand Junction R.W. Co. *v.* The County of Peterborough, 6 O.A.R. at pp. 343-4:—"The misapprehension of the legislature as to the state of the laws on any particular subject would not, as was stated by Cockburn, C.J., in Earl of Shrewsbury *v.* Scott, 29 L.J.C.P. at p. 53, have the effect of making that the law which the legislature had erroneously assumed it to be; so, also, in *Ex parte* Lloyd, 1 Sim. N.S. at p. 250, Lord Cranworth said:—'The legislature are not interpreters of the law, and Courts of law are not bound by a mistake of the legislature as to what the existing law is.'" And so per Ritchie, C.J., S.C., 8 S.C.R. at p. 98, (1883).

[2] As to No. 11 of section 92, see, further, the notes to Proposition 55.

[3] 4 S.C.R. at pp. 279-80, 1 Cart. at p. 309.

presumption that they have only exercised such powers as properly belonged to them."[1] Prop. 13-5

And special weight has been attributed by some judges to interpretations of the British North America Act traceable to those who took part in the framing of the Act, and were specially cognizant of all that concerned the federating of the Dominion. Thus, in Valin *v.* Langlois,[2] Ritchie, C.J., says that to hold, as was contended in that case, that "no new jurisdiction or mode of procedure can be imposed on the provincial Courts by the Dominion parliament, in its legislation on subjects exclusively within its power, is to neutralize, if not to destroy, that power, and to paralyze the legislation of Parliament. The statutes of Parliament," he says, "from its first session to the last, show that such an idea has never been entertained by those who took the most active part in the establishment of Confederation, and who had most to do with framing the British North America Act, the large majority of whom sat in the first Parliament." Similar is his reference to an early Act of the Dominion parliament, "when the intention of the parliament of Great Britain in enacting the British North America Act must have been fresh in the minds of the leading men who sat in the Dominion parliament, and who had taken the most prominent part in discussing and agreeing on the terms of Confederation and the provisions

Importance of the views of the Fathers of Confederation,

As expressed in the earlier Acts of the Dominion parliament.

[1] See the original French in 4 S.C.R. at p. 264. The above is Mr. Cartwright's translation, and is obviously more correct than the authorized English version in 4 S.C.R. at p. 279. For other citations, see per Badgley, J., in L'Union St. Jacque *v.* Belisle, 20 L.C.J. at p. 33, 1 Cart. at pp. 76-7; per Strong, J., in St. Catharines Milling and Lumber Co. *v.* The Queen, 13 S.C.R. at p. 636, 4 Cart. at p. 158; Regina *v.* Bush, 15 O.R. at p. 402, 4 Cart. at p. 694. See, however, at pp. 239-41, *infra*.

[2] 3 S.C.R. at p. 22, 1 Cart. at p. 177.

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of the British North America Act, and who, we historically know, watched its passage through the parliament of Great Britain."[1]

So per Taschereau, J.

And Taschereau, J., in the same case,[2] observes that :—"Where the commencement of a practice was almost coeval with the constitution, there is great reason to suppose that it was in conformity to the sentiments of those by whom the true intent of the constitution was best known :" (citing American authority).

But Dominion or provincial Acts declaratory of meaning of B.N.A. Act are futile.

But, although a certain weight must be attached to the views as to their respective powers expressed by the Dominion parliament and the provincial legislatures through the medium of their legislative enactments, it seems impossible to dispute the futility of any of these bodies assuming to declare authoritatively the proper interpretation of the British North America Act. And so, in Lenoir *v.* Ritchie,[3] Gwynne, J., says of the Nova Scotia Act there in question :—"The futility of a declaratory Act, passed by a subordinate legislature, for the purpose of authoritatively defining the intention entertained by the supreme parliament in the Act which gives to the subordinate its existence, and professing to put a construction upon a doubtful point in the Act as to the powers conferred upon the subordinate, is too apparent to need comment. The office of a declaratory Act is of a nature which requires that it should be passed only by the power which passed the Act, the intention of

So per Gwynne, J.

[1] Citizens' Insurance Co. *v.* Parsons, 4 S.C.R. at p. 234, 1 Cart. at p. 286.

[2] 4 S.C.R. at p. 302, 1 Cart. at p. 323.

[3] 3 S.C.R. at pp. 639-40, 1 Cart. at p. 546, (1879).

which is professed to be declared. And as to an Act providing for the future extension of the limits of the authority of the Lieutenant-Governor, it is equally plain that no power but the Imperial parliament, which has set limits to the jurisdiction of the provincial Executive, can extend and enlarge that jurisdiction."[1] Prop. 13-5

And Taschereau, J., also, puts the matter forcibly in Valin *v.* Langlois[2]:—"An interpretation by the parliament of Canada of the British North America Act is surely not binding on this, or on any Court of justice. It is for the judicial power to decide whether the interpretation put on the Constitutional Act by either the parliament of the Dominion or the legislatures of the provinces is correct or not, and it is so whether they read the law as granting them a right, or read it as refusing them such a right. I do not see how a Court of justice can admit its right to say that the parliament was wrong in assuming a certain power, and at the same time draw an inference that the parliament had not this or any other power, simply because it denied to itself that power. In either case, whether the parliament was right or wrong is to be decided by the Courts of justice."[3] And per Taschereau, J.

And, it may be added, a strong protest against basing a claim to legislative power upon the fact of continued exercise of such power by the Dominion or the provinces, and the acquiescence therein of the one or the other, is contained in the report

[1] As to this, however, see *supra* 100, n. 2.

[2] 3 S.C.R. at pp. 73-4, 1 Cart. at p. 207, (1879).

[3] Numerous *dicta* to the same effect might be cited, as per Ritchie, C.J., in Citizens' Insurance Co. *v.* Parsons, 4 S.C.R. at p. 237, 1 Cart. at p. 288; per Fournier, J., in Severn *v.* The Queen, 2 S.C.R. at p. 117, 1 Cart. at p. 461.

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Sir J. Thompson protests against basing provincial powers on acquiescence of Dominion.

of Sir John Thompson, as Minister of Justice, upon the Acts of the province of New Brunswick for 1889, in reference to c. 23, s. 4, providing for the appointment of stipendiary or police magistrates within any county by the Lieutenant-Governor in Council. He disputes the validity of this Act, and says:—"It is contended on the part of the provinces that the power in question is vested in the legislatures by virtue of their powers to 'exclusively make laws in relation to the administration of justice in the province, including the constitution, maintenance, and organization of the provincial Courts, both of civil and criminal jurisdiction;'"

Reg. *v.* Bush.

and in a recent case[1] the Court, after intimating that this provision was sufficient to confer the necessary authority, went on to observe that if there were any doubt about that, there is no doubt but that the provincial legislatures have assumed the right to pass laws providing for the appointment of justices of the peace, and that justices of the peace, police and stipendiary magistrates, have been appointed in pursuance of such laws, and that the

Appointment of justices of the peace.

Dominion government has never in any way interfered with any such appointments, and that the parliament of Canada has, from time to time, since the passing of the British North America Act, recognized the right so assumed, and the appointments so made, and that the question must be taken to be set at rest by the action of the parliament of Canada. Without dealing with the subject

Neither parliament nor the legislatures can add to their powers as given by B.N.A. Act,

at length, the undersigned deems it to be his duty to express his dissent from what may be supposed to be an inference fairly to be drawn from this argument, that the interpretation of the British

[1] Evidently Reg. *v.* Bush, 15 O.R. 398, 4 Cart. 690, (1888). See *supra* at pp. 175-6.

North America Act can in no way be affected by subsequent legislation by Parliament or the legislatures, or by any action of the government. No legislative body can by legislation increase or diminish the authority conferred upon it by the constitution,[1] nor can any expression of opinion or course of legislative action by either afford any conclusive or even satisfactory guide to its interpretation. No individual in Canada can be estopped from asserting or enforcing his rights or his objections under that Act by reason of any action on the part of the parliament of Canada or of the legislatures. No person in Canada can be bound by acquiescence in unconstitutional legislation on the part of the government, even if such acquiescence have occurred. The undersigned has been unable, therefore, to regard the decision referred to as disposing of the objections which arise to the appointment of such magistrates by the provincial authority. After all that has transpired in connection with this subject, it is evident that these questions must be left to be decided by judicial authority, and the undersigned does not therefore recommend, in regard to such Acts, the exercise of the power of disallowance.[2]

Prop. 13-5

Nor estop persons from relying on that Act.

As to Proposition 15, it is sufficient to say that, so far as it refers to the Dominion parliament, it is, in the words of Ritchie, C.J., in Valin *v.* Langlois.[3]

Prop. 15.

[1] See Proposition 16 and the notes thereto.

[2] As to the general question of the power to appoint justices of the peace, etc., see *supra* pp. 138-176.

[3] 3 S.C.R. at p. 26, 1 Cart. at p. 180.

PROPOSITION 16.

16. The Federal Parliament cannot amend the British North America Act, nor, either expressly or impliedly, take away from, or give to, the Provincial Legislatures a power which the Imperial Act does, or does not, give them; and the same is the case *mutatis mutandis* with the Provincial Legislatures.

Citizens Insurance Co. *v.* Parsons.

This Proposition is suggested by the words of Taschereau, J., in Citizens Insurance Co. *v.* Parsons.[1] So also Gwynne, J., in the same case,[2] says:—"It

Per Gwynne, J.

would seem as if the Parliament and the legislatures had been attempting to make among themselves a partition of jurisdiction, for which the British North America Act gives no warrant whatever. . . It surely

Neither Parliament nor the local legislatures can divest themselves of jurisdiction over the subjects committed to them,

cannot admit of a doubt that no Act of the Dominion parliament can give to the local legislatures jurisdiction over any subject which, by the British North America Act, is placed exclusively under the control of the Dominion parliament; and as the Parliament cannot by Act or acquiescence transfer to the local legislatures any subject placed by the British North

Or take jurisdiction away the one from the other.

America Act under the exclusive control of Parliament, so neither can it take from the local legislatures any subject placed by the same authority under their exclusive control."[3]

[1] 4 S.C.R. at p. 317, 1 Cart. at p. 334, (1880).

[2] 4 S.C.R. at p. 348, 1 Cart. at pp. 349-50.

[3] But as to this, see Proposition 46, and the notes thereto.

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So, again, Strong, J., in St.Catharines Milling and Lumber Co. *v.* The Queen,[1] says :—" That Parliament has no power to divest the Dominion in favour of the provinces of a legislative power conferred on it by the British North America Act is, I think, clear." And, from another point of view, in City of Fredericton *v.* The Queen,[2] Henry, J., observes that the agreement for the Union upon which the Imperial Act was based was in the nature of a solemn compact, to be inviolably kept, and that that compact cannot be changed by one any more than another of the contracting parties.[3]

Per Strong, J.

Per Henry, J.

Neither can change Federation compact.

The power of delegation, possessed alike by Dominion parliament and provincial legislatures, is, of course, another matter, and will be discussed in the notes to Proposition 63.

But both have powers of delegation.

[1] 13 S.C.R. at p. 637, 4 Cart. at p. 159, (1887).

[2] 3 S.C.R. at p. 548, 2 Cart. at p. 44, (1880).

[3] See the notes to Propositions 1 and 2, esp. pp. 3-5. This view of the British North America Act as embodying a treaty or compact between the provinces is much dwelt upon by Gwynne, J., in his judgment in the Prohibition case, in the Supreme Court, not yet reported. See, also, per Sedgewick, J., in the same case.

PROPOSITION 17.

17. Neither the Dominion Parliament nor Provincial Legislatures are in any sense delegates of, or acting under, any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for each Province, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament, in the plenitude of its power, possessed and could bestow. And so with the Dominion Parliament, with respect to those matters over which legislative authority is conferred, plenary powers of legislation are given as large, and of the same nature, as those of the Imperial Parliament itself.

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So far as it has reference to provincial legislatures, the above Proposition is taken *verbatim* from the judgment of the Privy Council in Hodge *v.* The Queen,[1] while the concluding words, as to the Dominion parliament, are those of Ritchie, C.J., in City of Fredericton *v.* The Queen.[2] In Hodge *v.* The Queen, the Privy Council illustrate what they thus lay down by holding that provincial legislatures have full authority to delegate their powers.[3] In the previous case of The Queen *v.* Burah[4] they had taken a similar view of the position of the Indian legislature, while in the subsequent one of Powell *v.* The Apollo Candle Co.,[5] where the question before them was as to the power of the legislature of New South Wales to delegate to the Executive authority to impose and levy duties, after referring to their two prior decisions just cited, they say:—"These two cases have put an end to a doctrine which appears at one time to have had some currency, that a colonial legislature is a delegate of the Imperial legislature. It is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate." And, again, in Dobie *v.* The Temporalities Board,[6] their lordships say that with-

Privy Council decisions.

Hodge *v.* The Queen.

The Queen *v.* Burah.

Powell *v.* The Apollo Candle Co.

Colonial legislatures are not mere delegates of the Imperial parliament.

[1] 9 App. Cas. at p. 132, 3 Cart. at p. 162, (1883). See, also, The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick, [1892] A.C. 437, where their lordships repeat the same language. See, also, per Boyd, C., in *Re* McDowell and The Town of Palmerston, 22 O.R. at p. 565, (1892); and Proposition 19 and the notes thereto.

[2] 3 S.C.R. at p. 529, 2 Cart. at p. 29, (1880).

[3] As to this, see, also, Proposition 63 and the notes thereto.

[4] 3 App. Cas. 889, 3 Cart. 409, (1878).

[5] 10 App. Cas. at p. 290, 3 Cart. at p. 442, (1885). For this case, when before the Supreme Court of New South Wales, see 4 N.S.W. 160, (1883), where it was held that the legislature could not delegate its powers.

[6] 7 App. Cas. at p. 146, 1 Cart. at p. 364, (1882).

Prop. 17

in the limits prescribed to them by the British North America Act, provincial legislatures are supreme, and "there is really no practical limit to the authority of a supreme legislature except the lack of executive power to enforce its enactments."

Dobie *v.* The Temporalities Board.

And quite in accord with the above dicta and decisions was the judgment of the Privy Council in Riel *v.* The Queen.[1] There it was contended that the Act, 43 Vict., c. 25, D., which provided for the administration of criminal justice in the North-West Territories, was *ultra vires*, that treason is in a peculiar manner an offence against the State, and that the Imperial parliament could not have intended that the Dominion parliament should legislate upon it to the extent of altering the rights under English statute of a man put upon his trial regarding it, and, further, that the Dominion Act was not necessary for peace, order, and good government. Their lordships, however, in the judgment point out that the British North America Act, 1871, 34-35 Vict., c. 28, s. 4, enacted that the parliament of Canada might from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any province, and add:—"It appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order, and good government cannot, as matters of law, be provisions for the peace, order, and good government in the territories to which the statute relates; and, further, that if a Court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure

Riel *v.* The Queen.

"Peace, order, and good government,"

[1] 10 App. Cas. 675, 4 Cart. 1, (1885).

peace, order, and good government, that they would be entitled to regard any statute directed to these objects, but which a Court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion parliament to enact. Their lordships are of the opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure, as it is known and practised in this country, has been authorized in Her Majesty's Indian Empire. Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequences."[1]

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Are words authorizing the utmost discretion of enactment.

Now, this supremacy of the legislature under our constitution is one of the points in which, in the words of the preamble of the British North America Act, it is a "constitution similar in principle to that of the United Kingdom."[2] For as Professor

Canada has a constitution similar in principle to that of the United Kingdom.

[1] And thus in *Re* Goodhue, 19 Gr. at p. 386, 1 Cart. at p. 569, (1872), Draper, C.J., aptly quotes the words of Mr. Justice Willes in Phillips *v.* Eyre, L.R. 6 Q.B. at p. 20:—"A confirmed Act of the local legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial parliament." See, also, per Gwynne, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 561, 2 Cart. at p. 54, (1880), and in The Queen *v.* Robertson, 6 S.C.R. at p. 65, 2 Cart. at p. 119, (1882); per Ritchie, C.J., in Lynch *v.* The Canada North-West Land Co., 19 S.C.R. at p. 212, (1891); per Boyd, C., in Reg. *v.* Brierly, 14 O.R. at pp. 532-3, (1887); per Spragge, C.J., in Reg. *v.* Hodge, 7 O.A.R. at p. 251, 3 Cart. at p. 167, (1882); per Burton, J.A., S.C., 7 O.A.R. at p. 274, 3 Cart. at p. 179; per Begbie, C.J., in Attorney-General of British Columbia *v.* City of Victoria, 2 B.C. (Hunter) at p. 5, (1890).

Phillips *v.* Eyre.

[2] See per Draper, C.J., in *Re* Goodhue, 19 Gr. at p. 382, 1 Cart. at p. 566, (1872).

Prop. 17

The sovereignty of Parliament.

Dicey says in his Law of the Constitution:—"The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our," (*sc.*, English), "political institutions"[1]; again, he calls it "the very keystone of the law of the constitution"[2]; and he speaks of it as "this marked peculiarity in our institutions."[3] The sovereignty of colonial legislatures, however, is necessarily exercisible only within prescribed limits. As Professor Dicey expresses it[4]:—"Colonial legislatures are within their own sphere copies of the Imperial parliament. They are within their own sphere sovereign bodies; but their freedom of action is controlled by their subordination to the parliament of the United Kingdom"; and in Attorney-General of Canada *v.* Attorney-General of Ontario,[5] Boyd, C., thus defines the position of Canadian legislatures in this matter:—"In relation to the supreme authority of the British parliament, Canada, in its composite character, forms a complete and separate subordinate government, possessing a 'central legislature' for the whole Dominion, and 'local legislatures' for the several members of the colonial Union. These various legislatures hold, in subdivision among them, powers applicable to all classes of subjects and to every purpose of government required for the entire territory and its several provincial parts; but as between the Dominion and the provinces each is an incomplete or limited government, having exclusive jurisdiction

Professor Dicey.

Per Boyd, C.

[1] 3rd ed., at p. 37.

[2] *Ibid.*, at p. 67.

[3] *Ibid.*, at p. 82.

[4] *Ibid.*, at p. 105.

[5] 20 O.R. at p. 245, (1890).

over certain enumerated classes of subjects, defined in general terms by the Imperial Constitutional Act. Barring, however, this delimitation of area, the parliament of the Dominion and legislatures of the provinces enjoy each in its own sphere and territory, delegations of sovereign power sufficient for all purposes of effective self-government." Prop. 17

And so, even in the United States, although the State legislatures are not as independent of Congress as our local legislatures are of the Dominion parliament,[1] and although it is there held that the State legislatures possess only a delegated power, and that, as *delegata potestas non delegatur*, they cannot delegate their powers to any other person or body,[2] it is nevertheless said by Redfield, Ch.J., in Thorpe *v.* Rutland and Burlington R.W. Co.[3]:—"It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organization of the American States"; upon which Mr. Bryce thus comments in his American Commonwealth[4]:—"It must not, however, be supposed from these dicta that even if the States were independent commonwealths, the Federal government having disappeared, their legislatures would enjoy anything approaching the The United States legislatures. Mr. Bryce.

[1]See as to this the notes to Proposition 61.

[2]See Bryce's Amer. Comm. (two-volume edition), Vol. 1, p. 451. See also the notes to Proposition 63.

[3]27 Verm. at p. 142; quoted by Cooley on Constitutional Limitations, 6th ed., at pp. 105-6.

[4]Vol. 1, at p. 429, (two-volume edition).

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The omnipotence of the British parliament.

omnipotence of the British parliament, 'whose power and jurisdiction' is, says Sir Edward Coke, 'so transcendent and absolute that it cannot be confined, either for persons or causes, within any bounds.' . . Parliament being absolutely sovereign can command, or extinguish and swallow up, the executive and the judiciary, appropriating to itself their functions. But in America a legislature is a legislature, and nothing more. The same instrument which creates it, creates also the executive governor and the judges. They hold by a title as good as its own. If the legislature should pass a law depriving the governor of an executive function conferred by the constitution, that law would be void. If the legislature attempted to interfere with the jurisdiction of the Courts, their action would be even more palpably illegal and ineffectual."[1]

American legislatures restricted by the fundamental law.

So, also, are the Canadian legislatures.

The Canadian parliament and local legislatures have more unfettered powers, as has been shown in the notes to Propositions 8 and 9, but neither can override the provisions of the British North America Act, and this is illustrated by a passage in the recent judgment of the Privy Council in the Manitoba school case, Brophy *v.* The Attorney-General of Manitoba.[2] The question there was whether, certain rights and privileges in relation to education acquired by the Roman Catholic minority in Manitoba under provincial Acts subsequent to the Union having been affected by a still later Act

The Privy Council in the Manitoba school case.

[1] See *supra* pp. 124-6. In Murray *v.* Hoboken Co., 18 How. at p. 284, the Court say:—"We do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." See, also, Fong Yue Ting *v.* United States, 149 U.S. at p. 715.

[2] 11 R. 35, at pp. 49-50; 11 Times L.R. at pp. 200-1, (1895).

repealing the former Acts, an appeal lay to the Governor-General under either sub-section 3 of section 93 of the British North America Act, 1867, or under sub-section 2 of section 22 of the Manitoba Act, confirmed as the latter had been by the British North America Act, 1871. Their lordships say:—"The Chief Justice of the Supreme Court was much pressed by the consideration that there was an inherent right in a legislature to repeal its own legislative Acts, and that 'every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted.'[1]. . Their lordships are unable to concur in the view that there is any presumption which ought to influence the mind one way or the other. It must be remembered that the provincial legislature is not in all respects supreme within the province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North America Act, as varied by the Manitoba Act. . . It may be said to be anomalous that such a restriction as that in question should be imposed on the free action of a legislature, but is it more anomalous than to grant to a minority who are aggrieved by legislation an appeal from the legislature to the executive authority? And yet that right is expressly and beyond all controversy conferred. If, upon the natural construction of the language used, it should appear that an appeal was permitted in circumstances involving a fetter upon the power of a provincial legislature to repeal its own enactments, their lordships see no justification for a leaning against that contention, nor do they think that it makes any difference whether the fetter is imposed by express words or by necessary implication." Prop. 17

[1]See 22 S.C.R. at pp. 654-6.

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But provincial legislatures having, in the words of the leading Proposition, authority as plenary and as ample within the limits prescribed by section 92 of the British North America Act as the Imperial parliament in the plenitude of its powers possessed and could bestow, and presided over, as they are, by the representative of the Crown,[1] it would seem to be necessarily incorrect to say as Gwynne, J., says in Citizens Insurance Co. *v.* Parsons[2] that:—"The provinces of the Dominion of Canada, by the wise precaution of the founders of our constitution, are not invested with any attribute of national sovereignty. The framers of our constitution, having before their eyes the experience of the United States of America, have taken care that the British North America Act should leave no doubt upon the subject. Within the Dominion the right of exercise of national sovereignty is vested solely in Her Majesty, the supreme sovereign Head of the State, and in the parliament of which Her Majesty is an integral part; these powers are, within this Dominion, the sole administrators and guardians of the comity of nations." In fact, in this very case, the judgment of the Privy Council,[3] as well as of the majority of the Supreme Court, was that provincial legislatures have power to pass Acts controlling and regulating the manner in which a trade or business shall be carried on in the province, legislation which, according to Gwynne, J., himself, "can only be vindicated upon the principles governing what is called the comity of nations, the administration of

Per Gwynne, J.

Provinces not invested with any attributes of national sovereignty.

Sed quære.

[1] See Proposition 7.

[2] 4 S.C.R. at pp. 346-7, 1 Cart. at pp. 348-9, (1880).

[3] 7 App. Cas. 96, see esp. at p. 113, 1 Cart. 265, see esp. at p. 278, (1881).

which belongs exclusively to supreme national sovereignty."[1] Prop. 17

And, with deference, it is submitted that in view of the authorities upon which the leading Proposition rests, it is scarcely correct to speak of either the Dominion parliament or the provincial legislatures as not possessing "legal omnipotence over the subject-matters" committed to them, as Hagarty, C.J., does of the latter in Leprohon *v.* The City of Ottawa.[2] Yet they are, of course, subject to the paramount authority of the Imperial parliament,[3] and to the veto power in the one case of the Imperial Executive, and in the other of the Dominion Executive.[4] And so in respect to provincial legislatures, Ramsay, J., says in North British and Mercantile Insurance Company *v.* Lambe[5]:—"It is admitted that the local legislatures are as omnipotent within the scope of their legislative powers as the Dominion parliament is within its powers. It does not, however, follow from this that the federal organization has no supremacy over the local. Such a pretension would

How far provincial legislatures can be said to be omnipotent within their own sphere.

[1] Ritchie, C.J., says, S.C., 4 S.C.R. at p. 238, 1 Cart. at pp. 288-9:—"I may affirm with confidence that the British North America Act recognizes in the Dominion constitution and in the provincial constitutions a legislative sovereignty, if that is a proper expression to use, as independent and exclusive in the one as in the other over the matters respectively confided to them." Cf. per Ritchie, C.J., in Mercer *v.* Attorney-General for Ontario, 5 S.C.R. at p. 643, 3 Cart. at p. 33, (1881); per Dorion, C.J., in Colonial Building and Investment Association *v.* Attorney-General of Quebec, 27 L.C.J. at p. 301, 3 Cart. at p. 139, (1883). And as to Gwynne, J.'s view of the subordinate position of provincial governments and legislatures, see Mercer *v.* Attorney-General for Ontario, 5 S.C.R. at p. 711, 3 Cart. at pp. 83-4. Also, *supra* pp. 105-7, and the notes to Proposition 61.

[2] 2 O.A.R. at p. 532, 1 Cart. at p. 603, (1878).

[3] See Proposition 12.

[4] See Proposition 10 and the notes thereto.

[5] M.L.R. 1 Q.B. at p. 182, 4 Cart. at p. 74, (1885).

Prop. 17

be utterly untenable, for the federal power alone has the power to nominate one of the branches of the local legislature, it can disallow its Acts, it can turn local works into federal works, and it can create new provinces. The true doctrine seems to me to be this, that the federal power is not generally supreme relatively to the local power. Its supremacy consists in its power to influence indirectly the action of the local power, or to paralyze it to some extent, not in the power to destroy it."[1]

Relation of the federal power to them.

It is matter of surprise, also, that in Regina *v.* Wing Chong,[2] Crease, J., though he cites the passage from the judgment of the Privy Council in Hodge *v.* The Queen,[3] upon which the leading Proposition is mainly based, nevertheless intimates his view that provincial legislatures cannot impose unequal taxation, quoting with approval a passage from Kent's Commentaries on American Law,[4] where it is said: —"The citizens are entitled to require that the legislature itself shall cause all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals and no one species of property may be unequally or unduly assessed."[5] Yet in the subsequent case of Regina *v.* The Gold Commissioners of Victoria District,[6] the Divisional Court in British Columbia, consisting of four judges, held unanimously that

Power to impose unequal taxation.

American legislatures cannot.

[1] See Proposition 10 and the notes thereto.

[2] 2 B.C. (Irving) at p. 161, (1885).

[3] 9 App. Cas. at p. 132, 3 Cart. at p. 162.

[4] 8th ed., Vol. 2, p. 388; 12th ed., Vol. 2, p. 331.

[5] Also quoted with approval by Gray, J., in Tai Sing *v.* Maguire, 1 B.C. (Irving) at pp. 108-9, (1878). In a despatch from Ottawa of April 8th, 1885, the Secretary of State says of some British Columbia Acts relating to Chinese:—"A question may arise as to whether or not the Acts, applying only to a portion and not to the whole of the population of the province, are constitutional:" B.C. Sess. Pap., 1885, at p. 464.

[6] 2 B.C. (Irving) 260, (1886).

section 14 of The Chinese Regulation Act, 1884, declaring that "No free miner's certificate shall be issued to any Chinese except upon payment of $15," was an attempt to impose a differential tax on the Chinese, and, therefore, *ultra vires* of the provincial legislature. And in support they refer to an instance mentioned in Todd's Parliamentary Government in the British Colonies,[1] where the royal assent was refused to an Act of the Queensland legislature imposing a differential tax on Chinese miners, and say:—"If this Act was wrong on the part of Queensland, it would, moreover, be unconstitutional if passed by our local legislature." But a reference to Mr. Todd's account of the matter shows that it was on Imperial grounds, and because the Act involved a breach of international comity that the royal assent was refused.[2]

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British Columbia judges hold likewise of our provincial legislatures.

Sed quære.

Mr. Todd.

Taxation of Chinese immigrants.

Again, in view of the leading Proposition, it is difficult to understand how an Act of the Dominion parliament or of a provincial legislature can be void and unconstitutional merely because in conflict with an Imperial treaty, unless, of course, such treaty has been confirmed by Imperial statute. Such an Act would no doubt call for the exercise of the veto power; but, if within their spheres, these legislatures are as sovereign as the Imperial parliament itself, it may well be asked how can such a conflict render their Act void?[3]

Colonial Acts conflicting with Imperial treaties.

[1] 1st ed. at pp. 154-5.

[2] See, also, Proposition 11 and the notes thereto; also Propositions 19, 21, and 61, and the notes thereto.

[3] That the provisions of an Imperial treaty cannot override those of an Imperial Act is beyond dispute: *In re* California Fig Syrup Company's Trade Mark, 40 Ch.D. 620, 627-8, (1885); *In re* Carter Medicine Company's Trade Mark, W.N. 1892, p. 106. And even in the United States, in the recent Chinese exclusion case, Fong Yue Ting *v.* United States, 149 U.S. 698, the Supreme Court held that the

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Reg. *v.* Wing Chong.

Per Crease, J.

Treaties are above all mere municipal law.

So per Gray, J., in Tai Sing *v.* Maguire.

However, in Regina *v.* Wing Chong,[1] Crease, J., referring to the treaties between Great Britain and China, says :—"These obligations are binding here and in other parts of the Dominion under section 132 of the British North America Act, and no province or the Dominion itself can lawfully pass laws interfering with that right without the previous revision of the treaties of the high contracting parties to them for that purpose. Treaties with foreign nations are above all ordinary municipal law, for obvious international reasons, for without such a provision there can be no permanent security, which is the life of all commercial intercourse . . . Such treaties are the especial care of the Dominion."[2] And on this same ground amongst others in the previous British Columbia case of Tai Sing *v.* Maguire,[3] Gray, J., held the provincial Chinese Tax Act, 1878, to be *ultra vires*, saying :—"Treaties are regarded as the highest and most binding of laws, beyond any merely internal regulation which one of the parties

provisions of an Act of Congress, passed in the exercise of its constitutional authority, must, if clear and explicit, be upheld by the Courts, even in contravention of stipulations in an earlier treaty, although, as pointed out in the previous case of Chae Chan Ping *v.* United States, 130 U.S. 581, "By the constitution of the United States laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other." However, it is there said that "the last expression of the sovereign will must control." As to Canada, no one, of course, will dispute the dictum of Richards, C.J., in Reg. *v.* Schram, 14 C.P. at p. 322, (1864) :—"As long as it is admitted that the Home government, by whom the supreme power of the Empire is exercised, is the proper channel through which all our relations and intercourse with foreign governments are to be carried on, the power to pass laws to bind the whole nation so far as regards those relations (and, as necessarily arising out of them, the peace of the Empire) must rest with the Imperial parliament."

[1] 2 B.C. (Irving) at pp. 161-2, (1885).

[2] See section 132 of the British North America Act.

[3] 1 B.C. (Irving) at p. 109, (1878). See this case referred to in Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 194.

thereto may make for the government of its own people, because, on the subjects to which they refer, they bind the people of both Powers, however dissimilar in other respects may be their institutions, customs, or laws;" and he cites the American case of Ware *v.* Hylton as illustrating this principle. He further, (at p. 110), implies that such a provincial Act would be *ultra vires*, "as coming in contact with the Dominion authority," citing section 132 of the British North America Act, by which it is specially enacted, "that the parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries."[2]

Prop. 17

B.N.A. Act, sect. 132.

It may be observed, in passing, that the Imperial government has not held that the relations of Great

Imperial treaties with China,

[1] 3 Dall. at p. 199.

[2] See Proposition 61 and the notes thereto. It would no doubt help what has been termed "the discipline of the Empire," if it were finally established that any colonial law which conflicts with an Imperial treaty is, *ipso facto*, void, and *ultra vires*, for that reason. See Dilke's Problems of Greater Britain, at p. 531. But with great respect to the views of the British Columbia judges above referred to, it is submitted that under our constitution, if this is so, it can only be on the ground that the fact of a colonial Act conflicting with an Imperial treaty is sufficient to show that it is extra-territorial in its effect, and does not concern merely local matters: see the notes to Proposition 26, *infra*. There does not, however, seem to be authority for this position. The matter, however, may be unimportant, for the Empire is held together, not by legal technicalities, but by the good sense and moderation, and national feeling of British people. How far the Crown by its prerogative can bind its subjects by treaty is discussed in the argument in the recent case of Walker *v.* Baird, [1892] A.C. 491, and many authorities are cited, but their lordships found it unnecessary to decide the point. See, also, Dicey's Law of the Constitution, 3rd ed., at p. 387. At p. 112 of the same work, Professor Dicey, while stating that Imperial treaties legally bind the colonies, adds:—"It should, however, be observed that the legislature of a self-governing colony is free to determine whether or not to pass laws necessary for giving effect to a treaty entered into between the Imperial government and a foreign power;" as to which, see section 132 of the British North America Act, above quoted.

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Britain with China require them to interfere with Australian legislation restricting the immigration or introduction of Chinese, on international grounds, and it has been treated as a matter of internal administration with which a responsible colonial government is competent to deal. And so in a despatch of May 31st, 1884, from Lord Derby to the Governor-General of Canada, the latter was informed that when the Dominion Ministers advised with regard to a similar Act passed in British Columbia, he might understand that the question was not held to involve Imperial interests, and that he should deal with it as a Canadian question only. His lordship added:—"I do not understand that your lordship invites me to state whether Chinese immigration into British Columbia is placed, by the British North America Act of 1867, under the control of the Dominion or of the provincial legislatures, but I may say that this is a point on which I am not prepared to give an opinion."[1] But in 1885 the Minister of Justice, Sir Alexander Campbell, recommended the disallowance of the British Columbia Act, 48 Vict., c. 13, intituled "An Act to prevent the immigration of Chinese," as being an interference with the power of Parliament to regulate trade and commerce, and as a case in which the ordinary tribunals could afford no adequate remedy for or protection against the injuries which would result from allowing the Act to go into operation, and he cited American authorities to show that the Courts of the United States took a similar view of the corresponding section of the Constitution of the United States, whereby Congress is given power to regulate commerce with foreign nations and among

And colonial Acts restricting Chinese immigration.

Sir A. Campbell.

Such Acts an interference with "the regulation of trade and commerce."

[1] Hodgins' Prov. Legisl., Vol. 1, at p. 833. See, also, Brit. Col. Sess. Pap., 1885, p. 464.

the several States and with the Indian tribes. The Act was disallowed accordingly.[1] See, however, the discussion as to the meaning of "the regulation of trade and commerce" in the notes to Proposition 49. Prop. 17

[1] Hodgins' Prov. Legisl., Vol. 2, pp. 285-7. See, also, *ibid.*, at pp. 288-9. On the general subject of such legislation, see Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 187, *et seq.*; and on the general subject of Imperial dominion exercisible over self-governing colonies through the operation of treaties, see *ibid.*, chap. 8, p. 247, *et seq.*

PROPOSITION 18.

18. It is not to be presumed that the Dominion Parliament has exceeded its powers, unless upon grounds really of a serious character; and so, likewise, in respect to Provincial statutes every possible presumption must be made in favour of their validity.[1]

Estoppel against impugning validity of statute.

[1] It would seem that one may, under certain circumstances, be estopped from setting up the unconstitutionality of a statute. Thus in Ross *v.* Guilbault, 4 L.N. 415, (1881), in an action by a liquidator for calls, under a special Dominion Act, placing a certain company in liquidation, the defendant pleaded that the Act incorporating the company, as well as that placing it in liquidation, were *ultra vires*, and Mackay, J., appears to have held that a shareholder could not urge such a plea against his liability for the amount unpaid on his stock. See, however, Ross *v.* The Canada Agricultural Insurance Co., 5 L.N. 23, (1882). Again, in Forsyth *v.* Bury, 15 S.C.R. 543, (1888), where one had allowed judgment for a sale of certain lands by the Court, without raising any objection to the plaintiff's title to a share in the lands, three of the judges of the Supreme Court of Canada, (Strong, Fournier, and Taschereau, JJ.), held that she was estopped from urging, before the final distribution of the proceeds of the sale, that the Act incorporating the Anticosti Company, which was the plaintiff's vendor, was *ultra vires* of the Dominion parliament, as being a provincial company for provincial objects. Ritchie, C.J., did not discuss the matter, but evidently held that for some reason there was no such estoppel; while Gwynne, J., also held this, but rested it upon the ground that the facts from which the estoppel was supposed to arise had not been properly pleaded. Lastly, in the Quebec case of McCaffrey *v.* Ball, 34 L.C.J. 91, (1889), it was held in an action for charges for the use of booms constructed in a navigable river under the authority of a provincial Act, according to the tariff provided by the Act, that the defendant, having voluntarily used the booms for the preservation of his logs, could not plead the unconstitutionality of the Act as a defence to the plaintiff's action. In Belanger *v.* Caron, 5 Q.L.R. at p. 25, (1879), Stuart, J., says:—"No Court should, or can, declare an Act void except in a case where its unconstitutionality is pleaded in due form by some one having an interest in questioning the validity of it." Cf. Cooley on Constitutional Limitations, 5th ed., at p. 197. See, also, *infra* p. 267, n. 3.

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The above Proposition, so far as it relates to legislation by the Dominion parliament, is taken from the judgment of the Privy Council in Valin *v.* Langlois,[1] delivered by Lord Selborne, where the question before the Board was whether they should grant leave to appeal from the decision of the Supreme Court of Canada, upholding the validity of the Dominion Controverted Elections Act, 1874. And so as to provincial Acts, in Severn *v.* The Queen,[2] Strong, J., says:—"It is, I consider, our duty to make every possible presumption in favour of such legislative acts, and to endeavour to discover a construction of the British North America Act which will enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the provincial legislature usurped powers which did not legally belong to it; and in doing this we are to bear in mind 'that it does not belong to Courts of justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it.'"[3]

The Privy Council.

Valin *v.* Langlois.

Per Strong, J.

Presumption in favour of provincial statutes.

And in the United States the rule of law is similar. Mr. Bryce says:—"It is a well-established rule that the judges will always lean in favour of the validity of a legislative act; that if there be a reasonable doubt as to the constitutionality of a

Similar presumption in the United States.

[1] 5 App. Cas. at p. 118, 1 Cart. at p. 161, (1879).

[2] 2 S.C.R. at p. 103, 1 Cart. at p. 447, (1878).

[3] The source of this last citation is not given. For other references in respect to the presumption in favour of the constitutionality of statutes, see S.C., 2 S.C.R. at pp. 107-8, 1 Cart. at p. 451; per Fournier, J., in Lenoir *v.* Ritchie, 3 S.C.R. at p. 606, 1 Cart. at pp. 511-2, (1879); per Burton, J.A., in Hodge *v.* The Queen, 7 O.A.R. at p. 272, 3 Cart. at p. 177, (1882), in Reg. *v.* Wason, 17 O.A.R. at pp. 235-6, 4 Cart. at pp. 593-4, (1889), and in Edgar *v.* The Central Bank, 15 O.A.R. at p. 202, 4 Cart. at p. 541, (1888); per Fisher, J., in The Queen *v.* City of Fredericton, 3 P. & B. at p. 168, (1879).

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statute, they will resolve that doubt in favour of the statute; that where the legislature has been left to a discretion, they will assume the discretion to have been wisely exercised; that where the construction of a statute is doubtful, they will adopt such construction as will harmonize with the constitution, and enable it to take effect."[1]

Marshall, C.J.

Proper attitude of the Courts when validity of a statute is disputed.

And as to the attitude in which Courts should approach the consideration of the validity of statutes, Torrance, J., in Angers *v.* The Queen Insurance Co.,[2] quotes and adopts the words of Chief Justice Marshall in McCulloch *v.* State of Maryland[3]:—"In the case now to be determined, the defendant, a sovereign State, denies the obligation of and contests the validity of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an Act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in the constitution, are to be discussed; and an opinion given which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance." And similarly in Gibson *v.* Macdonald,[4] O'Connor, J., refers to a passage in Mr. Justice Cooley's treatise on Constitutional Limitations as to judges shrinking from declaring

[1] American Commonwealth, (two-volume edition), Vol. 1, at p. 430. See per Swayne, J., United States *v.* Rhodes, 1 Abb. U.S.R. at p. 49, cited Bryce, *ib.*, at p. 387.

[2] 21 L.C.J. at p. 79, 1 Cart. at p. 153, (1877).

[3] 4 Wheat. at p. 399.

[4] 7 O.R. at p. 415, 3 Cart. at p. 324, (1885).

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legislative enactments void, and as to its being a delicate task to overrule the decision of the legislative department, and, perhaps somewhat quaintly, says that this applies much more forcibly to a like proceeding in this country, "where the expression 'constitutionality of a statute' is the result of a new departure and the creation of a new practice previously unknown to Canadian and British affairs, and to parliamentary and judicial practice, than to the legislative and judicial system of the United States, where that institution was made a fundamental principle of their constitution, as a result of popular volition. There, it is a fundamental principle of a new constitution, resulting immediately from the will of the people in a state of revolution. Here, it is merely a new thing engrafted on an old constitution, as a mere outgrowth of circumstances resulting from the necessities of local position in this new world, and of colonial dependence. And for the same reasons the application of the institution is also more difficult and irksome here than it is in the United States."[1]

Novelty of the subject in British Courts.

[1] It would seem that in the Australian colony of Victoria some judges hold that they must obey the legislature where its meaning is certain: Banks *v.* Orrell, 4 V.L.R., L., 219, (1878); per Higinbotham, J., in Reg. *v.* Pearson, 6 V.L.R., L., at p. 333, (1880); per Stawell, C.J., S.C., also at p. 333, who says:—"Had the legislature given power to make regulations applicable outside the port, and even beyond the territory of this colony, the Court would feel bound to give effect to them"; per Higinbotham, J., in Reg. *v.* Call, *Ex parte* Murphy, 7 V.L.R., L., 113, at p. 123, (1881), who says:—"Laws are the decrees of the High Court of Parliament, and if the Supreme Court should allow itself to judge of the competence of Parliament to enact this or any other law," (the law in question being one of the colonial legislature), "the inferior would be sitting as a Court of appeal from the superior Court, and, by refusing to administer, would, in effect, unmake or repeal the law." See, however, per Stawell, C.J., in *In re* Victoria Steam Navigation Board, 7 V.L.R., L., at p. 261, (1881), and per Higinbotham, J., S.C., at pp. 255-6. But it is submitted that such a view is properly met by the words of counsel, *arguendo*, in Reg. *v.* Call, *Ex parte* Murphy, above cited:—"The powers of our local legislature are circumscribed within the limits of the Constitution Act, and cannot be exercised beyond the jurisdiction so conferred; it is not a sovereign legislature like that of Great Britain."

Australian decisions.

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A striking example of the presumption in favour of the validity of statutes, and of the way in which the Court will strive so to construe them as to render it possible to uphold them, is, as pointed out by Mr. Edward Blake in his argument in Regina *v.* Wason,[1] to be found in the course taken by Ritchie, C.J., in City of Fredericton *v.* The Queen[2]:—

Examples of the presumption being given effect to.

City of Fredericton *v.* The Queen.

"Where dealing with an Act, which was called 'The Temperance Act,' and whose preamble recited the desirability of promoting temperance throughout the Dominion, he rejected both title and preamble as indicative of the legislative object said to be *ultra vires;* pointing out that if the enacting clauses were, as he held them to be, within the legislative power of Parliament under its authority to regulate trade and commerce, the Act must be held valid, title and preamble notwithstanding."[3]

But even this does not seem so strong a case as that which is to be found in Hamilton Powder Co. *v.* Lambe.[4] There, it appears, the Quebec legislature passed an Act requiring those who stored or kept gunpowder in any building to take out a license under a penalty. Afterwards, apparently for the very purpose of setting at rest doubts which had arisen as to the constitutionality of this provision, they passed an Act, (46 Vict., ch. 5), declaring that the dues payable for such licenses "were so imposed in order to the raising of a revenue for the purposes

Hamilton Powder Co. *v.* Lambe.

[1] 17 O.A.R. at p. 223, (1890).

[2] 3 S.C.R. at p. 532, *et seq.*, 2 Cart. at p. 32, *et seq.* Cf. S.C., per Taschereau and Gwynne, JJ.

[3] See this argument of Mr. Blake, printed *in extenso* by The Budget Printing and Publishing Co., Toronto, from which the above extract is taken. See, also, Proposition 20 and the notes thereto.

[4] M.L.R. 1 Q.B. 460, (1885).

of this province under the power conferred upon the legislature of this province by the 9th paragraph of section 92 of the British North America Act of 1867." The majority of the Court, however, upheld the Act as being in the nature of a police regulation, and not as coming within No. 9 of section 92. Cross, J., (at pp. 464-5), after expressing his view, that the requiring a license in such a case was not authorized by No. 9 of section 92, but was authorized as a police regulation, proceeds :—"Thus comes the question whether we can go against the legislature's own interpretation of the meaning of an Act previously passed by themselves, so as to hold the Act good as a police regulation, which they have declared an Act for raising revenue. While we hold, as in the case of Severn *v.* The Queen,[1] that they had no right to raise revenue by this means, I am disposed to consider it a mere mistake or oversight of the legislature to have included in the class of revenue licenses the one in question, should it be held to be one not *ejusdem generis* with those specially enumerated. And inasmuch as it is our business rather to give effect to an Act when it is possible to do so, than to consider it as having no effect, I hold that a license to meet the present case would still be valid as a police regulation, although it might be held void as to its provision for raising revenue; and that, if it were so, it was in the power of the powder company to have demanded a license on the payment of a moderate fee, and that the objection made to the validity of the license is not a sufficient bar to the prosecution for the penalty." And Ramsay, J., in like manner, says, at p. 466 :—"The powers of the local legislatures are gathered

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Per Cross, J.

The legislature's own declaration as to the nature of one of its Acts disregarded in order to hold the Act valid.

Per Ramsay, J.

[1] 2 S.C.R. 70, 1 Cart. 414, (1878). See *supra* p. 27, n. 1.

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from the subject-matter, and not from the declaration of their powers."

Such construction should be preferred as will make an Act valid.

An Act should be so construed, if susceptible of more than one construction, as to bring it within the powers of the legislature enacting it.[1] As Ritchie, C.J., says in Valin *v.* Langlois[2]:—"It must be assumed that parliament intended to do what they have a right to do, to legislate legally and effectively, rather than that they intended to do what they had no right to do, and which, if they did do, must necessarily be void and of no effect."

But counter considerations must not be overlooked.

The constitution must not be destroyed;

Notwithstanding, however, the rules thus laid down for upholding, where at all possible, the constitutional validity of statutes, the weighty words of Henry, J., in City of Fredericton *v.* The Queen,[3] may well be borne in mind:—"It has been properly said, that it is a serious matter to consider and decide that an Act of a legislature is *ultra vires;* but it is much more serious and unfortunate, by any judicial decision, to destroy the constitution of a country. The importance of our decision arises, not nearly so much from any effect it may have on the Act in question, which, in itself, claims from us the most patient and deliberate consideration, but from the general result, in view of the constitutional relations established by the Imperial Act in question,

[1] See Macleod *v.* Attorney-General of New South Wales, [1891] A.C. 455, esp. at pp. 457-9. And so per Fisher, J., in Robertson *v.* Steadman, 3 Pugs. at p. 639, (1876). In the Australian case, *In re* Victoria Steam Navigation Board, 7 V.L.R., L., at p. 263, (1881), Stawell, C.J., says in reference to the local statute then under consideration:—"In interpreting documents of any kind, the validity of which may depend on a limited authority, it is the duty of the Court to interpret the words, if possible, as applicable only to the limited power, on the principle *ut res magis valeat, quam pereat.*"

[2] 3 S.C.R. at p. 28, 1 Cart. at p. 182, (1879).

[3] 3 S.C.R. at p. 545, 2 Cart. at p. 42, (1880).

as provided in the sections referred to in regard to other subjects." And at a later page in the same case,[1] he cites from Story on the Constitution of the United States, (section 417), the words:—"Nor should it ever be lost sight of, that the government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is, *pro tanto*, the establishment of a new constitution." Prop. 18

Moreover, as pointed out by O'Connor, J., in Gibson *v.* Macdonald[2]:—"It is the privilege of every man to insist that his rights and interest shall be regulated by laws of undoubted validity. The sooner, then, a statute, which is seriously believed by many, and especially by a considerable portion of the legal profession, to be unconstitutional, is authoritatively pronounced upon the better. The public interest requires that proceedings under such a statute should be stayed, if it be void; or, if possessed of the authority it purports to have, it is necessary, or at least advisable, that doubts respecting it should be set at rest by a declaration of the proper tribunal, clothed with the necessary authority."[3] Nor unconstitutional Acts upheld.

One or two judges, it should be mentioned, have seemed to hold the view that provincial Courts should especially lean in favour of the validity of Acts

[1] 3 S.C.R. at p. 550, 2 Cart. at p. 46.

[2] 7 O.A.R. at p. 416, 3 Cart. at p. 325, (1885).

[3] In his report as Minister of Justice, on the Ontario Acts of 1889, Sir J. Thompson said of 52 Vict., c. 15, s. 4:—"If the provincial Act creating an offence and a penalty therefor is void, any enactment like this to give effect to it, if the objection to it is not taken at a certain stage, would be ineffectual. This provision is also open to the objection that is an attempt to limit the power of the Courts to adjudicate upon the constitutionality of provincial legislation." See *supra* p. 174, n. 1.

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of their own province, as, *e.g.*, per Taylor, C.J., in Stephens *v.* McArthur,[1] per Burton, J.A., in Edgar *v.* Central Bank[2]; but no such view as this can be said to be expressed in the cases generally.

An argument against the presumption in favour of provincial Acts.

Indeed, in the case of provincial Acts, it might well have been thought that the presumption rather was against than in favour of their validity, in accordance with the reasoning suggested by Mr. G. Cornewall Lewis in his essay on the Government of Dependencies,[3] who draws a distinction between a general power of subordinate legislation and a special power of subordinate legislation, using the word "subordinate" as meaning conferred by a supreme legislature, and says:—"Where a general power of subordinate legislation has been delegated, the subordinate legislature can make a law upon any subject, provided that the law which it makes be not inconsistent with a law established by the supreme legislature in relation to the same subject, and provided that the subordinate legislature be not

Sir G. C. Lewis.

prohibited by a law of the supreme legislature from legislating on such subject . . . But where a *special* power of subordinate legislation has been delegated, the subordinate legislature can only make a law covering the subject or subjects upon which it

Difference between a general and a special power of subordinate legislation.

is either expressly, or by necessary implication, empowered to legislate . . . A subordinate government possesses a power of legislating upon every subject which is not tacitly or expressly excepted from its powers. A special subordinate legislator possesses no legislative power which has not been expressly or by clear implication conferred upon

[1] 6 M.R. at p. 501.

[2] 15 O.A.R. at p. 202, 4 Cart. at p. 541.

[3] Ed. 1891, by C. P. Lucas, at pp. 76-7.

him. Consequently, in the latter case the presumption of law is against, in the former case it is in favour of, the existence of any legislative power." Prop. 18

However, in view of the authorities upon which Proposition 17 rests, it may not be proper to speak of the provincial legislatures as possessing only a special power of subordinate legislation, and thus, it may be, is justified a presumption in favour of the validity even of provincial Acts, though the legislatures are possessed only of specially enumerated powers[1]; but the point indicated by Sir G. C. Lewis does not seem to have been raised in any case where such a presumption has been relied on.

[1]See Proposition 66 and the notes thereto.

PROPOSITION 19.

19. If it be once determined that the Dominion Parliament or a Provincial Legislature has passed an Act upon any subject which is within its jurisdiction to legislate upon, its jurisdiction as to the terms of such legislation is as absolute as was that of the Parliament of Old Canada, or as is that of the Imperial Parliament in the United Kingdom, over a like subject.

City of Fredericton *v.* The Queen.

This Proposition is suggested by the words of Gwynne, J., in City of Fredericton *v.* The Queen,[1] where the question before the Court was the validity of the Canada Temperance Act, 1878, and the learned Judge explains his meaning as follows:

Per Gwynne, J.

—"What, therefore, may be the opinion of text-writers, or what may be the decision of the United States Courts, as to the powers of the central government and Congress, or of the legislatures of the several States, upon the like subject is unimportant[2]; for, as the Dominion government and parliament are founded upon the model of, and made similar in principle to, those of the United Kingdom of Great Britain and Ireland,[3] it follows that, once it is established that the subject-matter of the Temperance Act of 1878 is a matter within

Canadian parliament modelled on that of England.

[1] 3 S.C.R. at p. 573, 2 Cart. at p. 63, (1880).

[2] Cf. *supra* pp. 185-7.

[3] See Proposition 17, and the notes thereto.

the jurisdiction of the Dominion parliament to legislate upon, the provisions of that Act are as valid and binding and beyond the jurisdiction of this Court to deal with, otherwise than by construing it, as the Temperance Act of 1864, from which the Act of 1878 was taken, was valid and binding, and beyond the jurisdiction of the Courts of Old Canada to deal with, otherwise than by construing, and as a similar Act in Great Britain, if passed by the British parliament, would be valid and binding upon the Courts there."

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The Courts cannot override its enactments.

Their function is only to construe them.

And so in Lynch *v.* The Canada North-West Land Company,[1] Ritchie, C.J., says:—"As I said in City of Fredericton *v.* The Queen,[2] approved by the Privy Council in Russell *v.* The Queen,[3] in reference to the Dominion parliament; so with reference to the local legislatures:—'The general, absolute, uncontrolled authority to legislate in its discretion on all matters over which it has power to deal, subject only to such restrictions, if any, as are contained in the British North America Act, and subject, of course, to the sovereign authority of the British parliament.'"[4]

So, also, with Acts of the provincial legislatures.

In like manner, Badgley, J., in L'Union St. Jacques *v.* Belisle, observes[5]:—"It is manifest that the provincial Act in question here, like all other legislative Acts which come before the constituted judiciary, are only subjects of interpretation, and only as such can be examined and treated by Courts of justice, which are stopped at interpretation, because anything beyond that as to legislative Acts

[1] 19 S.C.R. at p. 212, (1891).

[2] 3 S.C.R. at pp. 529-30, 2 Cart. at p. 30, (1880).

[3] 7 App. Cas. 829, 2 Cart. 12, (1882).

[4] The sentence is left uncompleted. Some such words as "is given to it," or "is possessed by it," are required to complete it.

[5] 20 L.C.J. at pp. 34-5, 1 Cart. at pp. 78-9, (1872).

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The same is the case with Acts of United States legislatures.

is legislation, which it is idle to say Courts of justice have no authority to exercise. . . The powers of the judiciary in such a case can only be interpretative, certainly not disallowing;" and he adds that in the United States also the power of the judiciary is restricted to the discovery of violations of the provisions of the constitution.

Ambiguity or looseness of language cannot invalidate a statute.

So an Act cannot be declared invalid merely because its terms are ambiguous or its language loose. Thus, in Attorney-General of Canada *v.* Attorney-General of Ontario,[1] Boyd, C., says:—"Comment was made upon the ambiguity of the Act, the difficulty of ascertaining what was covered by its general language, and upon the need of showing plainly that the limited jurisdiction prescribed by our written law had not been exceeded. But so far as frame and phraseology go, the result of ancient observation—*juris consultus non curat de verbis*—avails for modern makers of the law. Language, large or loose, is to be shaped by presuming an intention to act with candour and within the bounds of constitutional competence. Vague or ambiguous expressions are to be read so as to support rather than to invalidate what is promulgated, and the Court in case of reasonable doubt will refrain from pronouncing against the statute.[2]" And in the Court of Appeal, Burton, J.A.,[3] says:—"Even if the enactment is open to the criticism of being vague or indefinite, that in itself could be no reason for declaring it void;" and the Court affirmed Boyd, C., in holding that the Act in question was *intra vires*, as the Supreme Court, on appeal to it, also held.[4]

[1] 20 O.R. at p. 245, (1890).
[2] See Proposition 18 and the notes thereto.
[3] 19 O.A.R. at p. 37, (1892).
[4] 23 S.C.R. 458.

PROPOSITION 20.

20. If the Dominion Parliament or a Provincial Legislature legislates strictly within the powers conferred, in relation to matters over which the British North America Act gives it exclusive legislative control, we have no right to enquire what motive induced it to exercise its powers.

City of Fredericton *v.* The Queen.

The above Proposition is derived, so far as concerns the Dominion parliament, from the judgment of Ritchie, C.J., in The City of Fredericton *v.* The Queen,[1] where he was dealing with the contention, raised as an argument against the validity of the Canada Temperance Act, 1878, that it could not be supported as an Act for the regulation of trade and commerce, and so falling within No. 2 of section 91 of the British North America Act, because it was strictly a Temperance Act passed solely for the promotion of temperance, and that "laws for the prevention of drunkenness, and of the like character of preventive means," were within the exclusive powers of the local legislature,[2] and that the recital of the Act indicated conclusively its character. He uses the words of the above Proposition, and later on adds:—"If Parliament in its wisdom deems it expedient for the peace, order, and good government of Canada so to regulate

Per Ritchie, C.J.

[1] 3 S.C.R. at pp. 532-3, 2 Cart. at pp. 32-3, (1880).

[2] But as to this see Appendix A, and Proposition 35, and the notes thereto.

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trade and commerce as to restrict or prohibit the importation into or exportation out of the Dominion, or the trade and traffic in, or dealing with, any articles in respect to which external or internal trade or commerce is carried on, it matters not, so far as we are judicially concerned, nor had we, in my opinion, the right to enquire whether such legislation is prompted by a desire to establish uniformity of legislation with respect to the traffic dealt with, or whether it be to increase or diminish the volume of such traffic, or to encourage native industry, or local manufactures, or with a view to the diminution of crime or the promotion of temperance, or any other object which may, by regulating trade and commerce, or by any other enactments within the scope of the legislative powers confided to Parliament, tend to the peace, order, and good government of Canada. The effect of a regulation of trade may be to aid the temperance cause, or it may tend to the prevention of crime, but surely this cannot make the legislation *ultra vires*, if the enactment is, in truth and fact, a regulation of trade and commerce, foreign or domestic. The power to make the law is all we can judge of; and the recital in the Act so much relied on ought not, in my opinion, to affect in any way the enacting clauses of the Act, which are in themselves abundantly plain and explicit, requiring no elucidation from and admitting of no control by the recital,[1] which can only be invoked in explanation of the enacting clauses if they be doubtful. . . It may be that all who voted for this Act may have thought it would promote temperance, and were influenced in their vote by that consideration alone, and desired that

Courts are not concerned with what motives prompted legislation,

Or with the incidental effects of legislation,

If the power so to legislate exists.

Nor is the object of the Act as recited in it of importance, if the enacting clauses can be justified under some head of legislative power.

[1] See *supra* pp. 264-6.

idea should prominently appear. Still, if the enacting clauses of the Act itself dealt with the traffic in such a manner as to bring the legislation within the powers of the Dominion Parliament, no such declaration in the preamble or permissive title can so control the enacting clauses as to make the Act *ultra vires*." Prop. 20

Thus it would seem that, though the legislature avow on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction,—yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered *ultra vires*. And, in like manner, in the same case,[1] Taschereau, J., says:—"It has been said the Temperance Act is not an Act concerning the regulation of trade and commerce, because it is not an Act *for* the regulation of trade and commerce, but only a Temperance Act. To this, I may well answer by the following words of Taney, C.J., in the License Cases, 5 How. 504, at p. 583:—'When the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the Court enquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade. . . The object and motive of the State are of no importance, and cannot influence the decision. It is a question of power.' These words may well be applied here. Is the Temperance Act of 1878 a regulation of trade and com-

So per Taschereau, J.

The License Cases.

The power, not the object or motive, is the important point.

[1] 2 S.C.R. at p. 559, 2 Cart. at pp. 52-3.

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merce, or of an important branch of trade and commerce? I have already said that it seems to me plain that it is so. Then, is it the less so because it has been enacted in the view of promoting temperance, or of protecting the country against the evils of intemperance? If for this object the Parliament has thought fit to make a regulation of the trade and commerce in spirituous liquors, does it lose its character of being a regulation of this trade by reason of the motive which prompted the legislator to enact this regulation? I cannot see it."[1]

Parliament may regulate trade and commerce with ulterior motives of promoting temperance.

Similar is the rule in the United States Courts.

And, in like manner, in the United States it is held that a Court cannot enquire into the motives of the legislature;[2] "nor refuse to apply an Act because they may suspect that it was obtained by fraud or corruption."[3]

Per Henry, J., *contra.*

However, Henry, J., in the City of Fredericton v. The Queen,[4] maintains, it must be admitted, a different view. He says:—"The first, and, as I think, the most important consideration, is the extent to which effect should be given to the provision, 'the regulation of trade and commerce,' and, admitting for the moment the power of Parliament to pass the Act in reference to that subject, has it properly dealt with it? In deciding upon this question, our first enquiry is, whether Parliament intended the Act as a regulation of trade or commerce? It does not necessarily follow that if one in

[1] See, also, per Gwynne, J., S.C., 3 S.C.R. at pp. 563-5, 570, 573, 2 Cart. at pp. 56-7, 61, 63.

[2] Cooley on Constitutional Limitations, 5th ed., at p. 197.

[3] Bryce's Amer. Comm. (two-volume edition), Vol. 1, at p. 431.

[4] 3 S.C.R. at pp. 548-9, 2 Cart. at pp. 44-5.

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the pursuit of one purpose or object does an unjustifiable act, he can take shelter under a right he did not intend to assert or act on. There are circumstances in which, in such a case, the party would not be held justified. The preamble of an Act will not, of course, by itself, give or take away jurisdiction to legislate. If, however, the legislature plainly shows by the preamble and provisions of the Act that the legislation was directed, not in the pursuance of legitimate power, but in reference to a subject over which it had no jurisdiction, I am far from thinking it would be legitimate." And a little later on in the same case[1] he says:—"The Act, taken altogether, shows it was not passed by Parliament as a regulation of trade or commerce. I have serious doubts, whether in such a case we would not be wrong in concluding that Parliament ever intended it as such, or that we should, in view of any power it had over the subjects of trade or commerce which it clearly did not intentionally exercise, give effect to the Act passed avowedly for a totally different purpose." But what has been above stated would seem to show the views thus expressed to be unsound.

The legislature cannot shelter its Acts under powers it had no intention of exercising when legislating.

It is obvious that there is nothing in the leading Proposition inconsistent with what is laid down in Proposition 36, that the object and design of an Act must, among other things, be determined in order to ascertain the class of subjects of legislation to which it really belongs. In the present Proposition it is assumed that the Act in question comes within one or other of the legislative powers conferred by section 91 or 92 of the British North America Act, as the case may be, and, then, what the Proposition states is that, this being so, the

The enquiry into the object and design of an Act in order to determine its true character is a different matter.

[1] 3 S.C.R. at p. 549, 2 Cart. at p. 45.

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motive which induced the legislature to exercise its power cannot be considered.

Colourable legislation.

Notwithstanding what is stated in Proposition 32 and the notes thereto, it is easy to conceive of legislation colourably *intra vires*, but in reality, and in view of its true object, beyond the scope of the legislature passing it, where there would, nevertheless, be no remedy under the constitution, except the exercise of the veto power.[1]

[1] As to which, see Proposition 10 and the notes thereto.

PROPOSITION 21.

21. When once an Act is passed by the Dominion Parliament or by a Provincial Legislature in respect to any matter over which it has jurisdiction to legislate, it is not competent for any Court to pronounce the Act invalid because it may affect injuriously private rights, any more than it would be competent for the Courts in England, for the like reason, to refuse to give effect to a like Act of the Parliament of the United Kingdom. If the subject be within the legislative jurisdiction of the Parliament, or of the Provincial Legislatures, respectively, and the terms of the Act be explicit, so long as it remains in force, effect must be given to it in all Courts of the Dominion, however private rights may be affected.

Queen *v.* Robertson.

The above Proposition is suggested by a passage in the judgment of Gwynne, J., in The Queen *v.* Robertson,[1] who, however, there applies the words only to the Dominion parliament. But they are equally incontestable in their application to the provincial legislatures, though that such is the case has been doubted by some judges. Thus, in L'Union

[1] 6 S.C.R. at p. 74, 2 Cart. at p. 125, (1882).

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Dicta to the contrary as regards provincial legislatures.

St. Jacques de Montreal *v.* Belisle,[1] Duval, C.J., maintains a contrary view, stating that a provincial legislature may legislate on the subjects set forth in section 92 of the B.N.A. Act, but "no power is given to it to impair the obligation of contracts,—a power which has ever been considered as contrary to every principle of sound legislation."[2] And so recently as 1883, in The Grand Junction R.W. Co. *v.* The Corporation of Peterborough,[3] Henry, J., said:—"I would require some argument to convince me that the local legislature, or even the Dominion legislature, has the right to interfere so as to affect contracts entered into, or quasi-contracts entered into, between parties." And in 1886, in *In re* Clay,[4] Gray, J., says:—"The legislature itself had no power to authorize the breaking of contracts."

But, as Dorion, C.J., states in Dobie *v.* The Temporalities Board,[5] in answer to a contention there raised that an Act of the province of Quebec amounted to "spoliation":—"That question was decided by the Privy Council in the case of L'Union St. Jacques *v.* Belisle.[6] The Union was unable to pay the stipulated annuities to members, and it got authority from the local legislature to commute the payments for a fixed sum. The question was raised whether the province of Quebec could interfere with vested rights, and the Privy Council maintained the validity of the local Act."

The Privy Council.

L'Union St. Jacques *v.* Belisle.

In this case of L'Union St. Jacques de Montreal *v.* Belisle, it appeared that the by-laws of the Union

[1] 20 L.C.J. at p. 38, 1 Cart. at 83, (1872).

[2] See, however, per Badgley, J., S.C., 20 L.C.J., at pp. 35-6, 1 Cart. at pp. 79-80; per Drummond, J., S.C., 20 L.C.J. at p. 45, 1 Cart. at p. 93. See, also, Propositions 17, 61, and 64. For a case before Confederation, see Reg. *v.* John Kerr, 2 Stockton's Bert. (N.Br.) 367,(1838).

[3] 8 S.C.R. at p. 100. And see per Gwynne, J., S.C., at p. 125.

[4] 1 B.C. (Irving) at p. 306.

[5] Doutre's Constitution of Canada, at p. 259, 1 Cart. at p. 388.

[6] L.R. 6 P.C. 31, 1 Cart. 63, (1874).

fixed the relief to be given, and the class of beneficiaries to receive it, amongst whom were, during their widowhood, the widows of deceased members of a certain standing in the society, the funds being derived from the periodical contributions of its members while connected with the society.[1] But the Act of the local legislature in question, in the words of the Privy Council judgment, "taking notice of a certain state of embarrassment resulting from what it describes in substance as improvident regulations of the society, imposes an enforced commutation of their existing rights upon two widows." Their lordships, however, held that the Act was *intra vires*.[2] Prop. 21

The case in the Ontario Courts which will perhaps occur most readily to the mind in connection with this subject is that of *Re* Goodhue.[3] A testator had devised the residue of his estate in trust for such of his children as should be living at the decease of his widow, and for the children of any of them who should then be dead. Before the widow's death, and on her application and that of the testator's children (all of whom were living), the Ontario legislature passed an Act, (34 Vict., c. 99), for dividing the property amongst the children of the testator forthwith, yet three judges concurred in holding that the Act was *intra vires*.[4] *Re* Goodhue.

And a striking illustration of the leading Proposition in its application to Dominion statutes is to be found

[1] See 20 L.C.J. at p. 30, 1 Cart. at pp. 72-3.

[2] L.R. 6 P.C. at p. 35, 1 Cart. at p. 69.

[3] 19 Gr. 366, 1 Cart. 560, (1873). For the judges' report in this case, on reference to them by the Lieutenant-Governor in Council, see 9 C.L.J.N.S. 82. See, also, per Harrison, C.J., in *Re* Hamilton and North-Western R.W. Co., 39 U.C.R. at pp. 111-2, (1876).

[4] See this case further referred to in the notes to Proposition 68, *infra*.

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Attorney-General *v.* Foster.

in the recent New Brunswick case of Attorney-General of Canada *v.* Foster,[1] where the question was whether section 19 of an Act making certain changes in Customs duties, 53 Vict., c. 20, D., was *intra vires*, which section provided that the Act should be held to have come into force on March 28th, 1890, (though assented to only on May 16th, 1890), and that it should be held to apply and to have applied to all goods imported or taken out of warehouse for consumption on or after the former date. The defendants had, in April, 1890, taken whiskey out of warehouse, paying the full duty then chargeable, and had had no warning by prior resolution of the House of Commons or otherwise[2] that any further claim for duty would or could be made on them, and had since sold the whiskey. The government, however, now sued them for increased duty chargeable under the Act, relying on the above section. All the judges of the provincial Supreme Court except Palmer, J., held the enactment to be *intra vires*, notwithstanding the hardship of imposing an additional duty, by legislation made retroactive, upon an importer who had taken his goods out of warehouse; and Palmer, J., held otherwise, not on the ground of any hardship or injustice, but because he held that the section infringed to an unconstitutional extent upon property and civil rights in the province, in which the other judges did not agree with him.[3]

Retroactive Dominion Act as to Customs duties.

Property and civil rights in the province.

[1] 31 N.B. 153, (1892).

[2] In *Ex parte* Wallace & Co., 13 N.S.W., L., 1, (1892), the Court held that the practice of collecting new duties from the date of the resolution of the House of Assembly for their imposition, and before the bill imposing such duties becomes law, is a well-established and constitutional practice instituted for the protection of the Queen's revenue, referring to Todd's Parliamentary Government in England, 2nd ed., Vol. 1, pp. 792-3.

[3] See the case further referred to on this point in the notes to Proposition 37, *infra*. At p. 160, Fraser, J., suggests that, under

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Provincial Acts interfering with vested rights.

To return to cases of provincial Acts, in The Municipality of Cleveland *v.* The Municipality of Melbourne,[1] the Quebec Court of Queen's Bench, Appeal side, held that the Act of the Quebec legislature authorizing the Lieutenant-Governor to revoke the right of certain municipalities to exact tolls on a toll-bridge for default in making repairs, and to transfer the property to others, was valid, upon the ground that it related to property and civil rights in the province and was merely of a local nature. Ramsay, J., in delivering the judgment, observes[2]: —"I don't think any legislature has the right to deprive a person of his property, but by the theory of the constitution it has the power. In a word, it is assumed that the legislature is a judge of the morality of its own legislation." And, similarly, in the recent case of *Re* McDowell and the Town of Palmerston,[3] where the validity of an Ontario Act, 48 Vict., c. 92, was impugned on the ground that the owner was deprived of his land without proper compensation, Boyd, C., held the Act *intra vires*, saying:—"The Act deals with land in Ontario, and the legislature had power (so far as abstract competence is concerned) to change the ownership, and

Cleveland *v.* Melbourne.

Per Ramsay, J.

McDowell *v.* Town of Palmerston

certain circumstances, the defendant might not be without remedy. He says:—"While I think there are no grounds for disturbing the verdict in this case, it may be that the defendants may have some right to relief, if by reason of what passed between them and the collector of customs, at the time the goods were taken out of warehouse, they have suffered a loss, or if they were induced to withdraw the goods from warehouse, and make sale of them before the duties were actually increased or before they had reason to believe such duties would be increased, and have in consequence been damnified. Whether if the defendants are entitled to relief, it can be given by the government, or can only be obtained by an application to Parliament on the recommendation of the government, it is not for me to say."

[1] 4 L.N. 277, 2 Cart. 241, (1881).

[2] 4 L.N. at p. 279, 2 Cart. at p. 244.

[3] 22 O.R. 563, (1892).

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that without making any compensation. The expediency and the justice of such legislation is another matter." And as to the power so to legislate, he cites a passage from the judgment of Day, J., in the ante-Confederation case of *Ex parte* Ira Gould,[1] where he says :—"The powers of legislation of the provincial parliament are as extensive as those of the Imperial parliament while they keep within the limits fixed by that statute, even if they were to interfere with Magna Charta."[2]

Ex parte Ira Gould.

Again, in License Commissioners of Prince Edward County *v.* County of Prince Edward,[3] it was urged that a certain Ontario Act was *ultra vires* and void because it was of an *ex post facto* character, inasmuch as it provided for the payment by municipalities of expenses previously incurred by license commissioners, but Spragge, C.J., held the Act valid.

Ex post facto provincial Act.

[1] 2 Matt. R.R. at p. 378, (1854).

[2] It does not seem clear, however, that in 1854, when these words were spoken, being before the Colonial Laws Validity Act, Imp. 28-29 Vict., c. 63, any colonial legislature had power to "interfere with Magna Charta." In an article on the competence of colonial legislatures to enact laws in derogation of common liability or common right, by T. C. Anstey, published in Papers read before the Juridical Society, Vol. 3, p. 401, (1868), the author says, at p. 404:—"Quite independently of Parliament and its supremacy, there were other reservations expressed or implied in every grant of legislative power to every colonial dependency; reservations of allegiance to the Crown and the law, of protection by the Crown and the law, of the King's prerogative, of the liberties of Englishmen, of Magna Charta, of the Petition of Right, of the Habeas Corpus Act, of the leading principles of the Revolution of 1688; and, in fine, of all the natural and common law elements and grounds of the English constitution itself." He goes on to point out, however, that since June 29th, 1865, the date of the passing of the Colonial Laws Validity Act:—"Any colonial legislative assembly,—out of India,—if possessing a moiety of elected representatives of the people, may lawfully enact any measure which is not repugnant to some Act of Parliament in force within the colony; and mere 'repugnancy' to the law,—other than statute law,—will not invalidate such enactment. Subject to that statute, however," (*sc.*, Imp. 28-29 Vict., c. 63, s. 2), "the law remains unchanged."

[3] 26 Gr. 452, 2 Cart. 678, (1879).

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Kelly *v.* Sulivan.

The case of Kelly *v.* Sulivan[1] also calls for mention in connection with the present subject. The Prince Edward Island Land Purchase Act of 1875 was passed "to convert the leasehold tenures into freehold estates upon terms just and equitable to the tenants as well as to the proprietors," for which purpose it provided a Commissioners' Court, by proceedings in which a compulsory transfer of the lands affected to the government could be obtained, and in Kelly *v.* Sulivan the Supreme Court of the island held that the Act came within No. 13 of section 92 of the British North America Act as legislation on property and civil rights in the province. Peters, J., observes[2] that, if the provincial legislature were restricted to subjects coming within what American jurists call the "right of eminent domain," the Act, at least in some of its provisions, would be an excess of legislative power; that no such public emergency or necessity existed as would justify legislative interference under the right of eminent domain, in connection with which he quotes the following passage from Kent's Commentaries[3]:—"It undoubtedly must rest, as a general rule, in the wisdom of the legislature, to determine when public uses require the assumption of private property; but if they should take it for a purpose not of a public nature, as if the legislature should take the property of A and give it to B; or if they should vacate a grant of property, or of a franchise, under the pretext of some public use or service, such cases would be gross abuses of their

Prince Edward Island Land Purchase Act, 1875.

Per Peters, J.

Eminent domain.

The rule in the United States.

Legislatures can take private property for public purposes only.

[1] 2 P.E.I. 34, 1 S.C.R. 1, (1875-7).

[2] 2 P.E.I. at pp. 87-8. In the Supreme Court of Canada, to which the case was taken, Richards, C.J., says, 1 S.C.R. at p. 35:—"It is not doubted in the Court below, and we do not doubt that the legislature of the Island had a right to pass the statute in question."

[3] 12th ed., Vol. 2, at p. 340.

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discretion and fraudulent attacks on private right, and the law would be clearly unconstitutional and void."

Difference between the powers of Canadian legislatures and those of the United States in this respect.

This forcibly brings out the difference between the sovereign powers of our legislatures[1] when legislating on the subjects committed to their jurisdiction, and the limited powers of legislatures in America. In the constitution of the United States, moreover, there is the well-known provision[2] that "no State shall . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts;" and, as to Congress itself, it is provided that "no bill of attainder or *ex post facto* law shall be passed."[3] And as to the restriction against impairing the obligation of contracts not being imposed upon Congress, it is said in Judge Cooley's General Principles of Constitutional Law[4]: — "That Congress should not have been prohibited from impairing the obligation of contracts, as the States were, may well excite some surprise. It was certainly never intended that Congress under any circumstances should exercise that tyrannical power, and it probably never occurred to any one as possible that it would ever attempt to do so. While, if it should attempt it, in the case of private contracts, the Act, it would seem, might well be held not to be legitimate legislation, and therefore incompetent and void, yet the clause is considered not to apply to congressional legislation. In respect to contracts by the government itself, so long as they remain executory, if it shall choose not to perform them, there can be no redress."

Laws impairing the obligation of contracts.

Even Congress may, perhaps, be restricted in its powers in this respect.

[1] See Proposition 17 and the notes thereto.

[2] Art. 1, sect. 10, (1).

[3] Art. 1, sect. 9, (3).

[4] 2nd ed., by A. C. Angell, at p. 327.

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No such limitations of power are imposed upon legislatures in Canada, and the dicta of Henry, J., in Venning *v.* Steadman,[1] would seem unsustainable, when he says:—"If the government had the right to say, 'You cannot fish on your own land without taking a license,' they could demand a tax so heavy as to prevent the parties using their rights. It is possible that the extreme right to legislate to that extent does exist, but it could only be exercised where there was an extreme public necessity for it. It is possibly true that extreme course, for the purpose of revenue, might be resorted to by the government, but, then, very great necessity must be shown before, I think, Parliament would have the right to say to a riparian owner, 'You shall not exercise your common law rights of property without paying a tax to the government.'"[2]

Venning *v.* Steadman.

Per Henry, J.

We may, however, find some consolation for having to trust so much more unfettered powers to our legislatures than is entrusted to legislatures in the United States in the following remarks of Professor Dicey in his Law of the Constitution[3]:—"A ruler who might think nothing of overthrowing the constitution of his country would, in all probability, hesitate a long time before he touched the property or interfered with the contracts of private persons. Parliament, however, habitually interferes, for the public advantage, with private rights. Indeed, such interference has now (greatly to the benefit of the community) become so much a matter of course as hardly to excite remark, and few

Dicey on parliamentary interference with property and private contracts.

[1] 9 S.C.R. at pp. 226-7, (1884).

[2] With this may be compared the views of Palmer, J., in Attorney-General v. Foster, 31 N.B. 153, at p. 162, *et seq.*, (1892), further referred to in the notes to Proposition 37, *infra*.

[3] 3rd ed., pp. 46-7.

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persons reflect what a sign this interference is of the supremacy of Parliament. The statute book teems with Acts under which Parliament gives privileges or rights to particular persons, or imposes particular duties or liabilities upon other persons. This is, of course, the case with every railway Act, but no one will realize the full action, generally the very beneficial action of Parliamentary sovereignty, who does not look through a volume or two of what are called Local and Private Acts."

Local and Private Acts.

And, in conclusion, it may be well to recall the words of Robinson, C.J., in City of Toronto and Lake Huron Railroad Co. *v.* Crookshank,[1] where he says that if in an Act the legislature recites something as a fact, "so far as this Act is concerned, the legislature stating the fact is conclusive, though, if it were attempted to affect other rights or interests of individuals, in any proceeding wholly apart from this Act, by assuming as incontrovertible facts whatever might happen to be asserted in it, then I apprehend we should be clearly warranted by authority in holding individuals not to be bound by such recitals in any other respect than for the purposes of that Act."

Legislative recitals as to facts.

[1] 4 U.C.R. at p. 318. Reference may also be made here to an article on Blackstone's Theory of the Omnipotence of Parliament, by T. C. Anstey, in Papers read before the Juridical Society, Vol. 3, at p. 325.

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22. Although part of an Act either of the Dominion Parliament or of a Provincial Legislature may be *ultra vires*, and therefore invalid, this will not invalidate the rest of the Act, if it appears that the one part is separate in its operation from the other part, so that each is a separate declaration of the legislative will, and unless the object of the Act is such that it cannot be attained by a partial execution.[1]

The Privy Council.

The judgment, or rather the report, of the Judicial Committee of the Privy Council upon the Dominion Liquor License Acts, 1883-4, supports and illustrates this Proposition. They say that the said Acts "are not within the legislative authority of the parliament of Canada. The provisions relating to adulteration, if separated in their operation from the rest of the Acts, would be within the authority of the parliament; but as in their lordships' opinion they cannot be so separated, their lordships are not prepared to

Report on the Dominion License Acts.

[1] As pointed out in the notes to Proposition 10, provincial Acts, if disallowed by the Governor-General in Council, must be disallowed altogether; this or that clause of an Act cannot be vetoed without the remainder: see *supra* at p. 197. In the argument before the Privy Council in the Manitoba School Case, 1894, (printed for the Government of Canada, London, 1895, at p. 236), the Lord Chancellor said of the Governor-General:—"He disallows an Act as a whole, and could not disallow a section." Attorney-General Miller of Manitoba seems, in 1884, to have thought otherwise: Hodgins' Prov. Legisl., Vol. 1, pp. 685-6.

Prop. 22 report to her Majesty that any part of these Acts is within such authority."[1]

Per Ramsay, J.

Some of the words of the Proposition, however, have been suggested by expressions of Ramsay, J., in two cases. The first of these is Dobie *v.* The Temporalities Board,[2] where that learned judge says:—"To let a law stand which is partly *ultra vires* and partly constitutional may be the most perfect mode of defeating the legislative will. I, therefore, say that a law which is *ultra vires* in part may thereby be *ultra vires* in whole, and so it should be construed,—at all events, when it appears that the object of the Act is not attained by a partial execution. Take, for instance, an Act of incorporation of a railway company from Quebec to Toronto. Could that be interpreted as an Act of incorporation from Quebec to the province line? Unquestionably it could not be."[3]

Is the object of the Act obtained by a partial execution?

An Act may embody one connected scheme.

It is sufficiently clear that we cannot always treat particular sections of an Act as isolated independent clauses. The Act may form one connected scheme to attain one definite object, and so may have to be dealt with as a whole, when its constitutionality is impugned. Thus, in Clarkson *v.* The Ontario Bank,[4] where the Ontario Act respecting assignments for the benefit of creditors was in question, Hagarty, C.J.O., says:—"We are not dealing with each section as if it stood by itself, but we are

[1] 4 Cart. 342, n. 2; Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 555. For the decision of the Supreme Court of Canada in this matter, see Ont. Sess. Pap., 1885, No. 32, at p. 6; Cass. Sup. Ct. Dig., at p. 509; also Dom. Sess. Pap., 1885, No. 85, which contains a *verbatim* report of the argument before the Supreme Court.

[2] 3 L.N. at p. 251, 1 Cart. at pp. 384-5, (1880).

[3] See *infra* pp. 297-8.

[4] 15 O.A.R. at p. 179, 4 Cart. at p. 514, (1888).

dealing with an Act of general application dealing with the whole estate, regulating the administration, interfering with existing legal priorities, prescribing modes and times for distribution," etc. And so, per Osler, J.A.[1] :—" The Act in question, with its amendments, is to be regarded as a whole. Its object and scope are to be considered as those of a single scheme or system for dealing with the property of insolvent persons under certain conditions, in the interest of their creditors providing a uniform law applicable alike to all debtors throughout the province."[2] To adopt an expression suggested by the words of Killam, J., the rule may perhaps be stated thus—if a section of an Act "appears proper to be treated as an independent substantive enactment," the question of its constitutionality may be considered apart from the rest of the Act.[3]

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Act regulating assignments for creditors.

Per Killam, J.

Independent substantive enactments.

The other judgment of Ramsay, J., above referred to is that in The Corporation of Three Rivers *v.* Sulte,[4] where a question arose as to the validity of a Quebec enactment, 38 Vict., c. 76, s. 75, s-s. 2, which purported to empower the municipal council of Three Rivers to make by-laws for determining under what restrictions and conditions and in what

Per Ramsay, J.

Three Rivers *v.* Sulte.

[1] S.C. 15 O.A.R. at p. 189, 4 Cart. at pp. 525-6. See, also, 15 O.A.R. at p. 193, 4 Cart. at p. 531.

[2] The effect of Attorney-General of Ontario *v.* Attorney-General of Canada, [1894] A.C. 189, would clearly seem to be that the Act here referred to, as a whole, must be held to be *intra vires*. See an article on this decision, 30 C.L.J. 182.

[3] Stephens *v.* McArthur, 6 M.R. at p. 508, (1890). It seems that the constitution of the Hawaiian Islands, as it existed in 1875, contained the following commendable provision : —" To avoid improper influences which may result from intermixing in one and the same Act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in its title." See Marchant *v.* Marchant, 3 Haw. Rep. 661. This was continued in the constitution promulgated in 1887 : 5 Haw. Rep. App. at p. 717.

[4] 5 L.N. at p. 332, 2 Cart. at p. 283, (1882).

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manner the collector of inland revenue for the district of Three Rivers should grant licenses to merchants, traders, shopkeepers, tavern-keepers, and other persons to sell liquors. Ramsay, J., delivering the judgment of the Court, held that this enactment could not rest on No. 9 of section 92 of the British North America Act, whereby local legislatures are empowered to make laws in relation to shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes, although such a form might be given to restrictions on licenses, (as had indeed been done by the by-law in question in the case), as would have the effect of raising a revenue. "For," he says, "the statute cited in the case under our consideration is not an authorization to the municipal council to tax by way of license, but an Act allowing the municipality to put restrictions on the sale of liquors. . . . A statute *ultra vires* does not remain in force for a part, because some fractional part is within the powers of the legislature, unless it appears that the subject beyond the powers of the legislature is perfectly distinct from that within, and that each is a separate declaration of the legislative will. This is not the case here."[1]

No. 9, sect. 92, B.N.A. Act.

For part of an Act to be held *intra vires*, while other part is *ultra vires*, each part must be a separate declaration of the legislative will.

Statutes *intra vires* in some applications only.

What this would seem to illustrate is that the fact that something may be done under a provincial Act which the legislature would have power to authorize does not necessarily make that Act *intra vires* even in respect to such application of it. But, on the other hand, an Act may certainly sometimes be *intra*

[1] However, he held that the enactment was sustainable under No. 8 of section 92, "Municipal Institutions in the Province," a decision which was affirmed on appeal by the Supreme Court of Canada: 11 S.C.R. 25, 4 Cart. 305, (1883), the decision of the Privy Council in Hodge *v.* The Queen, 9 App. Cas. 117, 3 Cart. 144, decided since the judgment of Ramsay, J., being held to have put an end to any question on the point.

vires in some of its applications, while *ultra vires* in others. Thus, in McKilligan *v.* Machar,[1] Killam, J., held that certain provisions of the Dominion Lands Act, 1883, 46 Vict., chap. 17, which provided that "copies of any records, documents, plans, books, or papers belonging to or deposited in the Dominion Lands office, attested under the signature of the Minister of the Interior, etc., shall be competent evidence in all cases in which the original records, documents, books, plans, or papers would be evidence," were *ultra vires* so far as they could be considered to apply to suits merely for the cancellation as clouds upon title of conveyances (not being letters patent from the Crown), registered under the Manitoba Lands Registration Act. "The provincial legislature," he says, (at p. 422), "has the authority to regulate the administration of justice in the province, including procedure in civil matters in the Courts; though it has in some cases been held that the Dominion parliament could establish courts for the determination of matters arising under statutes within its powers, or, perhaps, regulate to some extent procedure in the ordinary Courts in suits upon subjects within its legislative authority."[2] And so, in Allen *v.* Hanson,[3] Dorion, C.J., delivered the judgment of the Quebec Court of Queen's Bench confirming the validity of the Dominion Winding-up Act, 45 Vict., c. 23, as amended and extended to all corporations doing business in Canada, no matter where incorporated, by 47 Vict., c. 39, and, after referring to certain provisions of the Act which were objected to, observes: —"There are in every statute enactments which do

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Dominion Lands Act, 1883.

Copies of official records as evidence.

Dominion Winding-up Act.

[1] 3 M.R. 418, (1886).

[2] As to this, see the notes to Proposition 37.

[3] 13 L.N. at p. 133, 16 Q.L.R. at p. 64, 4 Cart. at p. 495, (1890).

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not apply to every case coming under its provisions ; this does not destroy the effect of such enactments as are applicable to the particular case to be acted upon ; and, even if such enactments were *ultra vires*, the remainder of the Act would still remain in force in so far as it is applicable to foreign corporations and their property in this country." And, on appeal to the Supreme Court,[1] Ritchie, C.J., observes of the same Act :—" It by no means follows that because all the provisions of the Act may not be applicable to foreign cases that those portions which are should not be acted on."

Re the Canadian Pacific R.W. Co.

So, again, in *Re* the Canadian Pacific Railway Co.,[2] the Queen's Bench of Manitoba held that the provincial Act, 49 Vict., c. 11, which by section 4 provided that " No company, corporation, or other institution not incorporated under the provisions of the statutes of this province shall be capable of taking, holding, or acquiring any real estate in this province unless under license from the Lieutenant-Governor in Council, under any statute of this province," was *ultra vires* in so far as it affected the Canadian Pacific Railway Company.[3]

[1] 18 S.C.R. at p. 673, 4 Cart. at p. 477, (1890).

[2] 7 M.R. at p. 389, (1891).

[3] In a report, as Minister of Justice, of February 9th, 1895, on an ordinance of the North-West Territories, which empowered the council of a city, town, or municipality to make by-laws as to permitting railways to be laid along streets, and as to compensation for damage to property caused thereby, and regulating traffic and the speed of trains within the municipality, blowing of whistles, etc., and to impose penalties for breach, Sir C. H. Tupper says that "if such powers are intended to apply to railways which are subject to the provisions of the Railway Act, they are, to that extent, *ultra vires*." But, by section 13 of the North-West Territories Act, R.S.C., c. 50, the power of the legislative assembly to make ordinances is expressed to be subject to any Act of the parliament of Canada at any time in force in the Territories. As to the position in this regard of the provincial legislature, see Propositions 46 and 61, and the notes thereto.

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The Executive or Pardoning Power Case.

In Attorney-General of Canada *v.* Attorney-General of Ontario,[1] and the Ontario Act there in question, a curious case arose in connection with this matter. The Act was 51 Vict., c. 5, and was entitled "An Act respecting the Executive Administration of Laws of this Province," and provided that:—"In matters within the jurisdiction of the legislature of the province, all powers, authorities, and functions which, in respect of like matters, were vested in or exercisible by the Governors or Lieutenant-Governors of the several provinces now forming part of the Dominion of Canada, or any of the said provinces, under commissions, instructions, or otherwise, at or before the passing of the British North America Act, are and shall be (so far as this legislature has power thus to enact) vested in and exercisible by the Lieutenant-Governor or administrator for the time being of this province, in the name of Her Majesty, or otherwise as the case may require, subject always to the royal prerogative as heretofore." Boyd, C., observes[2]:—"The Act is full of cautionary phrases, saving the royal prerogative and limiting its provisions to matters within provincial jurisdiction . . It is, perhaps, impossible to say how much ground this covers; it may be that (apart from what is specifically named in the next section) not a single appropriate power exists outside of statutes, which will fall within the purview of this enactment. But its vague comprehensiveness does not make it void if there be suitable powers in matters within the jurisdiction of the province which are thus annexed to the executive office. And, again, if the section operates on nothing, it may be innocuous, but it is not unconstitutional.

Use in Act of formula, "so far as this legislature has power thus to enact."

Per Boyd, C.

Vague comprehensiveness of an Act does not invalidate it.

[1] 20 O.R. 222, 19 O.A.R. 31, 23 S.C.R. 458, (1890-4).

[2] 20 O.R. at p. 246.

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Particular cases to be dealt with as they arise.

We are not called upon by analysis or criticism of possible powers and functions, which may be embraced in the words used, to discriminate as to what are within and what without the scope of the enactment; any particular case is to be dealt with as and when it arises;" words cited with approval by Fournier, J., in the Supreme Court.[1] And in the Court of Appeal for Ontario, in the same case, Osler, J.A., observes[2]:—"Where the legislatures in passing an Act are careful to say that they only mean it to be effectual so far as they have power to make it so, and no attempt has been made to act upon or to enforce it, it appears to me to be premature to ask for a declaration of its validity," and all the judges of that Court concurred in holding the Act to be *intra vires;* as did also those of the Supreme Court, with the exception of Gwynne, J.[3]

So per Osler, J.A.

Other authorities for Prop. 22.

Among other cases which illustrate the leading Proposition is Blouin *v.* The Corporation of the City of Quebec.[4] There the validity of a provincial Act which restricted the sale of spirituous liquors between certain hours, imposing imprisonment with hard labour as one of the penalties for disobedience, was in question, and Meredith, C.J.,[5] says:—"It has not, I believe, been contended that if the provision of law in question was otherwise valid, it ought to be deemed wholly void in consequence of the addition of a penalty which the provincial legislature had not

Blouin v. Quebec.

[1] S.C., 23 S.C.R. at p. 471.

[2] 19 O.A.R. at p. 40.

[3] 23 S.C.R. 458. See, also, in connection with the above citations, per Strong, C.J., *ib.* at p. 471, and Gwynne, J., *ib.* at p. 475. See, also, *supra* p. 272. And for another instance of an Act being held *intra vires* in one application, though it might be *ultra vires* as to other possible applications, see *Re* Windsor and Annapolis R.W. Co., 4 R. & G. 312, 3 Cart. 387, (1883).

[4] 7 Q.L.R. 18, 2 Cart. 368, (1880).

[5] 7 Q.L.R. at p. 24, 2 Cart. at pp. 375-6.

power to impose. The part of the law which is objectionable is easily separated from the remainder, and where that is the case, as well according to the law of England[1] as according to our law, the part which is void cannot defeat that which is valid.[2] Prop. 22

So, also, in Morden *v.* South Dufferin,[3] where a provision for rebate of 10 per cent. on all taxes paid before a certain date was contained in the same section with a provision for the addition of a percentage on all taxes not paid by a certain date, the Court of Queen's Bench of Manitoba held the former *intra vires* and the latter *ultra vires*. The provisions, said Taylor, C.J., were entirely distinct from each other. However, on appeal to the Supreme Court of Canada,[4] the Court, (Gwynne, J., dissenting), held that even as to the addition of the percentage the Act was not *ultra vires*, such percentage not being "interest" within the meaning of No. 19 of section 91 of the British North America Act. Morden *v.* South Dufferin. No. 19, sect. 91, B.N.A. Act.

And, in spite of what is said by Ramsay, J., in the words above quoted from his judgment in Dobie *v.* The Temporalities Board,[5] it would seem that Acts incorporating companies may sometimes be *ultra vires* in part, without the whole incorporation being invalidated. Thus in Regina *v.* Mohr,[6] Act incorporating company may be in part void and in part valid.

[1] Citing Queen *v.* Robinson, 17 Q.B. 466; King *v.* The Inhabitants of St. Nicholas, 3 A. & E. 79; and King *v.* The Inhabitants of Maulden, 8 B. & C. 78.

[2] Hodge *v.* The Queen, 9 App. Cas. 117, 3 Cart. 144, (1883), finally establishes the power of provincial legislatures to impose imprisonment with hard labour.

[3] 6 M.R. 515, (1890).

[4] *Sub nom.* Lynch *v.* The Canada North-West Land Co., 19 S.C.R. 204, (1891).

[5] 3 L.N. at p. 251, 1 Cart. at pp. 384-5. *Supra* p. 290.

[6] 7 Q L.R. at p. 190, 2 Cart at p. 266, (1881).

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Dorion, C.J., says, speaking of the Act 43 Vict., c. 67, D., incorporating the Bell Telephone Company with power to build and operate telephone lines in Canada or elsewhere :—"It is not necessary to decide whether or not the whole Act of incorporation is *ultra vires*, it is sufficient for this case that the authority given to erect telegraph poles in the streets of the city of Quebec is *ultra vires*." And in the Colonial Building and Investment Association *v.* The Attorney-General of Quebec,[1] Dorion, C.J., with whom Cross and Baby, JJ., concurred, says :—"Without deciding that the whole Act incorporating the Company respondent is *ultra vires*, we hold that the Company has no right to exercise in the province of Quebec the powers conferred by its Act of incorporation, to buy, lease, and sell lands, etc., in the province of Quebec."

The Bell Telephone Co.

The Colonial Building and Investment Association.

Tessier, J., however, held the Act of incorporation, which was a Dominion Act, to be wholly void. He says[2]:—"It would be a refinement (*subtilité*) to contend that because there is a question about debentures and interest coupons, the Act is within the powers of the federal parliament; that is not the main (*principal*) object of the statute, but only an accessory to the main object, and that accessory becomes subject to the general laws of Canada."

Colonial Laws Validity Act.

In conclusion, it may be noted that the Colonial Laws Validity Act, Imp. 28-29 Vict., c. 63, s. 2, enacts that[3]:—"Any colonial law which is or shall

[1]27 L.C.J. at p. 304, 3 Cart. at p. 143, (1882).

[2]27 L.C.J. at p. 299, 3 Cart. at p. 136. The Privy Council, on appeal to it, held the Act in all respects *intra vires:* 9 App. Cas. 157, 3 Cart. 118, (1883).

[3]See per Willes, J., in Phillips *v.* Eyre, L R. 6 Q.B. at pp. 20-1, cited by Fournier, J., in Allen *v.* Hanson, 18 S.C.R. at p. 678.

be in any respect repugnant to the provisions of any Act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."[1] Prop. 22

[1]Other citations in support and illustrative of the leading Proposition are: *Ex parte* Renaud, 1 Pugs. at p. 291, 2 Cart. at p. 471, (1873); Regina *v.* McMillan, 2 Pugs. at p. 112, 2 Cart. at p. 491, (1873), where speaking of an Act of the local legislature, imposing penalties for sale of liquors without license, the Supreme Court of New Brunswick said:—"But if they have exceeded their powers, the excess only—that is, the mode pointed out for the recovery of the fines—would be void: Cowan *v.* Wright, 23 Gr. at p. 626, (1876); Keefe *v.* McLennan, 2 R. & C. at p. 10, 2 Cart. at pp. 406-7, (1876); Johnson *v.* Harris, 1 B.C. (Irving) at p. 95, (1878); Queen *v.* The Mayor, etc., of Fredericton, 3 P. & B. at p. 143, (1879); Parent *v.* Trudel, 13 Q.L.R. at p. 144, (1887); and for the case of a by-law, see *In re* Crothers and Rural Municipality of Louise, 15 C.L.T. 140, (1895). In Cooley on Constitutional Limitations, 6th ed., at pp. 209-10, the author speaks of part of an Act being unconstitutional, though the Act be not void *in toto*. It depends, he says, "upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder." Of course the law cannot make any distinction between what is great and what is trivial on a branch of the law, when the legislature has no jurisdiction at all: per Hensley, J., in Munn *v.* McCannell, 2 P.E.I. at p. 152.

PROPOSITION 23.

23. A transaction which is *ultra vires* of the parties to it can derive no support from an Act which is itself *ultra vires* of the legislature passing it; nor will the right of those affected by it, to treat it as of no legal force or validity, be interfered with by such an Act. So likewise incapacities imposed upon persons guilty of certain practices by an Act which is *ultra vires* will not enure against, or affect, those persons.

The Privy Council.

Burgoin v. Chemin de Fer de Montreal.

Provincial Act assuming to sanction transfer of a federal railway to the provincial government.

The first part of the above Proposition rests upon the judgment of the Privy Council in Burgoin *v.* La Compagnie du Chemin de Fer de Montreal.[1] The transaction in question in that case was an attempted conveyance by means of a deed and a ratifying Act of the Quebec legislature, of a federal railway with all its appurtenances and all the property, liabilities, rights, and powers of the existing company to the Quebec government, and through it to a company with a new title and a different organization, dissolving the old federal company and substituting for it one which was to be governed by and subject to provincial legislation. Their lordships held that a Dominion Act was essential to give the transaction between the company and the

[1] 5 App. Cas. 381, esp. at p. 406, 1 Cart. 233, esp. at p. 249, (1880).

government of Quebec full force and effect, and that, until it was so validated, the public and the creditors of the company, under which category the appellants in this case fell, being no parties to the transaction,[1] could not be affected by it, and say[2] :—"If the transaction, not having the sanction of the parliament of Canada, were *ultra vires* of the company and the government and legislature of Quebec, it was of no legal force or validity against the appellants, and might be so treated by them whether it were formally set aside or not." Prop. 23

Those not parties to such a transaction could not be affected by it, notwithstanding the Act.

The second clause of the Proposition is derived from the judgment of their lordships in Théberge *v.* Laudry.[3] The Quebec Controverted Election Act, 1875, by section 267, provided that if it was proved before the Court on the trial of an election petition that corrupt practices had been committed by or with the actual knowledge or consent of any candidate, not only the election should be void, but the candidate should for seven years next after the day of such decision be incapable of being elected to and of sitting in the legislative assembly, of voting at any election of a member of the House, or holding any office in the nomination of the Council of the Lieutenant-Governor of the province. One Laudry, having been found guilty of corrupt practices under the above Act by the Superior Court of Quebec, made application to the Privy Council for leave to appeal, and Mr. Benjamin contended on his behalf, that the Act, so far as it engrafted on the decision of the judge the above declaration of incapacity, was

Théberge v. Laudry.

Incapacities imposed by statute for corrupt practices at elections,

[1] In reference to the qualification, "being no parties to the transaction," see *supra* p. 260, n. 1.

[2] 5 App. Cas. at p. 406, 1 Cart. at p. 249.

[3] 2 App. Cas. 102, 2 Cart. 1, (1876).

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ultra vires of the legislature of the province. Their lordships, however, held[1] that it was not necessary to express any opinion whatever upon the point, for that:—"If the Act of parliament was in this respect, as contended, *ultra vires* the provincial legislature, the only result will be that the consequence declared by this section of the Act of parliament will not enure against, and will not affect, the petitioner."

Cannot take effect if statute *ultra vires*.

As Taschereau, J., forcibly remarks in Lenoir *v.* Ritchie,[2] speaking of provincial Acts:—"A provincial statute passed on a matter over which the legislature has no authority or control under the British North America Act is a complete nullity—a nullity of *non esse*. *Defectus potestatis, nullitas nullitatum.*" And so in *Re* Goodhue,[3] where an order of the Court had been made to distribute the estate of a deceased testator, as sanctioned by an Act of the local legislature, in spite of contrary provisions contained in the will, which Act was now attacked as *ultra vires*,[4] Draper, C.J., observes:—"If the Act can be shown to be a dead letter, the order founded upon its validity falls lifeless and inoperative."

An *ultra vires* Act is a complete nullity,

Whether it be Dominion or provincial.

And though in all the above cases the Acts in question were provincial Acts, there can be no doubt that what is stated in the Proposition applies as well to Dominion Acts. And the law is evidently similar in the United States, for Judge Cooley says[5]:—"When a statute is adjudged to be uncon-

So, also, in the United States.

[1] 2 App. Cas. at p. 109, 2 Cart. at p. 11, (1876).

[2] 3 S.C.R. at pp. 624-5, 1 Cart. at p. 531, (1879).

[3] 19 Gr. at p. 378, 1 Cart. at p. 564, (1872).

[4] See *supra* p. 281.

[5] Constitutional Limitations, 6th ed., at p. 222.

stitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an Act void *in toto* is true also as to any part of an Act which is found to be unconstitutional, and which consequently is to be regarded as having never at any time been possessed of legal force." Prop. 23

Should the Court ever of its own motion declare an Act *ultra vires?*

A case of Belanger *v.* Caron[1] has been referred to on a former page,[2] in which Stuart, J., laid it down that:—"No Court should, or can, declare an Act void except in a case where its unconstitutionality is pleaded in due form by some one having an interest in questioning the validity of it." This appears an appropriate place to cite the contrary dicta of Meredith, C.J., in Valin *v.* Langlois,[3] a case decided about the same time. There it was contended in reference to a case cited that, because the constitutionality of a certain Act had not been questioned in it, the judges who had decided it could not avoid giving effect to the Act, even if they deemed it unconstitutional. Meredith, C.J., however, says:—

Per Meredith, C.J., in Valin *v.* Langlois.

"To that view I must say I am altogether opposed, as well upon the ground of authority as upon principle. . . To me it seems plain that a statute emanating from a legislature not having power to pass it is not law; and that it is as much the duty of a judge to disregard the provisions of such a

A legislative enactment must be either void or valid; it cannot be merely voidable.

[1] 5 Q.L.R. at p. 25, (1879).

[2] *Supra* p. 260, n. 1.

[3] 5 Q.L.R. at p. 16, 1 Cart. at p. 231, (1879).

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statute as it is his duty to obey the law of the land. As to the distinction between what is voidable and what is void, I do not think that under our system it is applicable to statutes, which must be either void or valid,—if void, they cannot be rendered more void, and, if valid, they cannot be affected by any judicial authority." And so, also, Duval, C.J., in L'Union St. Jacques de Montreal *v.* Belisle,[1] says:—"The same law which has proscribed boundaries to the legislative power has imposed upon the judges the duty of seeing that that power is not exceeded."[2]

Per Duval, C.J.

[1] 20 L.C.J. at p. 39, 1 Cart. at p. 84, (1872).

[2] See, also, *supra* pp. 266-7. See, however, Cooley on Const. Limit, 5th ed., at p. 196, *et seq.* At p. 197 he says:—"Nor will a Court listen to an objection made to the constitutionality of an Act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it." King *v.* Joe, 8 Haw. Rep. 287, may also be referred to. For an unsuccessful attempt to hold responsible the members of a provincial Executive Council who had concurred in an *ultra vires* order in Council for the sale of Crown lands, and in the execution of a deed of the same to a purchaser pursuant to such order in Council, see Church *v.* Middlemiss, 21 L.C.J. 319, (1877), afterwards referred to in The Liquidators of the Maritime Bank of the Dominion *v.* The Receiver-General of the Province of New Brunswick, 20 S.C.R. at p. 698, (1889).

PROPOSITIONS 24 AND 25.

24. The scheme of the British North America Act comprises a fourfold classification of powers :—Firstly, over those subjects which are assigned to the exclusive plenary power of the Dominion Parliament; secondly, over those assigned exclusively to the Provincial Legislatures; thirdly, over subjects assigned concurrently to the Dominion Parliament, and the Provincial Legislatures ; and, fourthly, over a particular subject, namely, education, which for special reasons is dealt with exceptionally, and made the subject of special legislation.

25. The frame of section 92 of the British North America Act differs from that of section 91 in its form. That of section 91 is general, of section 92 particular.[1] By section 91, the Imperial

[1] "But this is precisely in character with the nature of the jurisdiction intended to be given to each," per Gwynne, J., City of Fredericton *v.* The Queen, 3 S.C.R. at p. 567, 2 Cart. at p. 58, the passage from which this Proposition is derived. Mr. Justice Loranger, however, in his Letters upon the Interpretation of the Federal Constitution (first letter), at p. 54, observes :—"The law has granted to the provinces power over all local matters, in addition to those specially enumerated in the paragraphs preceding paragraph 16. It follows that the concession to the provinces was general, for the aggregate of local and private laws constitutes a generality." See, further, as to Mr. Justice Loranger's view, *infra* pp. 308, n. 2, 316-7, 342-3.

Prop. 24-5 Parliament unequivocally, but in general terms, declares its intention to be to place under the jurisdiction of the Dominion Parliament all matters, excepting only certain particular matters assigned by the Act to the Local Legislatures. The 92nd section, therefore, instead of dealing with the subjects to be assigned to the Local Legislatures in the same general terms as had been used in the 91st section, by placing under the jurisdiction of those legislatures all matters of a purely local or private nature within the Province, (a mode of expression which would naturally lead to doubt and confusion, and would be likely to bring about that conflict which it was desirable to avoid), enumerates, under items numbered from 1 to 15 inclusive, certain particular subjects, all of a purely provincial, municipal, and domestic nature, that is to say, "of a local or private character," and then winds up with item No. 16, to prevent the particular enumeration of the "local and private" matters included in items 1 to 15 being construed to operate as an exclusion of any other matter, if any there might be, of a merely local or private nature.[1]

[1]See, also, Propositions 26, 27, 28, 49, 59, 64, and 66, and the notes thereto.

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The above Propositions are derived from the judgment of Gwynne, J., in City of Fredericton *v.* The Queen,[1] and, so far as the first of them is concerned, the words are almost identical with those used by Lord Carnarvon in moving the second reading of the Act in the House of Lords.[2]

City of Fredericton *v.* The Queen.

Per Gwynne, J.

The learned judge goes on to state the propriety and wisdom, in his view, of this mode of framing the two sections, as follows :—"The wisdom of this mode of framing the 91st and 92nd sections appears when we read the items enumerated in the 91st section, some of which might be well considered to be matters which would come within some of the subjects enumerated in the 92nd section; but the scheme of the Act being to vest in the local legislatures all matters of a purely provincial, municipal, and domestic, or 'of a local or private' nature, and in the Dominion parliament all matters which, although they might appear to come within the description of provincial, or municipal, or 'local or private,' were deemed to possess an interest in which the inhabitants of the whole Dominion might be considered to be alike concerned, and that, therefore, these matters should be under the control of the Dominion parliament, in order to prevent doubt as to those matters it was, as it seems to me, a necessary and wise provision to make, that notwithstanding anything in the Act, and however much any of the items enumerated in the 91st section might appear to come within the subjects which, as being of a purely 'local or private' nature, were enumerated in the 92nd section, yet they should not

The mode of framing sects. 91 and 92 of the B.N.A. Act.

The concluding clause of sect. 91.

[1] 3 S.C.R. at p. 562, 2 Cart. at p. 55, and 3 S.C.R. at pp. 566-7, 2 Cart. at pp. 58-9, (1880).

[2] Hans., 3rd Ser., Vol. 185, at p. 565, quoted again by Gwynne, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 209-10, (1895).

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be deemed to come within such classification or description."[1]

And this judgment of Gwynne, J., is cited by Mr. Todd in a passage in his Parliamentary Government in the British Colonies, where he says:— "The true principle of interpretation applicable to the distribution of powers under the British North America Act to the Dominion and provincial legislatures respectively is pointedly expressed by Chief Justice Harrison, who states that the exclusive legislative powers assigned to the Dominion parliament by section 91 of the British North America Act are designed as examples merely of the powers conferred, while section 92 appears to enumerate all the exclusive powers capable of being exercised by the local legislatures. This principle was confirmed by Mr. Justice Gwynne."[2] Harrison, C.J., it may be added, in the judgment cited, points out

Subjects specified in sect. 91 of B.N.A. Act are examples only of Dominion powers.

[1]However, the authorities referred to in the notes to Proposition 59 (*q.v.*) would seem to show that the learned judge has here misconceived the proper force and meaning of the concluding clause of section 91; but the effect which he attributes to it would seem to have been secured by the earlier provision in that section that, "notwithstanding anything in this Act, the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated." See per Gwynne, J., in City of Fredericton *v.* The Queen, 3 S.C.R at pp. 566-7, 2 Cart. at p. 58, (1880). And Judge Travis, of whose treatise on Canadian constitutional law some adverse criticism will presently be necessary, has, it is submitted, correctly interpreted this provision in the following passage (p. 164):—"The Imperial parliament, while giving to the local legislatures general exclusive legislative authority on the subjects of property and civil rights, made the express provision in the Act that, notwithstanding such exclusive power was given, generally, to the local legislatures exclusively to legislate on property and civil rights, with respect to twenty-nine classes of large and general subjects, Parliament should have the right to legislate with respect to *them*, even though they did come within property and civil rights."

The concluding clause of sect. 91.

[2]Todd's Parl. Gov. in Brit. Col., 2nd ed. at pp. 443-4, referring to per Harrison, C.J., in Ulrich *v.* National Insurance Co., 42 U.C.R. at p 156, (1877). Cf. per O'Connor, J., in Gibson *v.* M'Donald, 7 O.R. at p. 424, 3 Cart. at p. 334, (1885). But, as Mr. Loranger points out (see *infra* pp. 342-3), among the classes enumerated in section 92 is the general residuary class of "all matters of a merely local and private nature in the province."

that section 91 expressly provides that the enumeration of classes therein contained is not thereby "to restrict the generality" of the preceding extensive powers "to make laws for the peace, order, and good government of Canada." Prop. 24-5

And Sedgewick, J., throws light upon the general scheme of the distribution of legislative power in the British North America Act in *In re* Prohibitory Liquor Laws,[1] where he points out that the English-speaking provinces were in the main in favour of a legislative union, but Lower Canada, "properly tenacious of 'its language, its institutions, and its laws,'" desired a provincial legislature, in order to the perpetuity of these rights, and necessitated a federal union or none at all: "but they were none the less desirous of giving the central authority all jurisdiction compatible with that determination, including generally those subjects that would be common to the whole Canadian people irrespective of origin or religion. Now, the English criminal law was the law of Lower Canada . . Then, too, the Lower Canadian legislature and people had long previously adopted of their own free will the general principles of English commercial law . . Commercial law was not in that class of 'institutions and laws,' which they regarded as peculiarly their own, and they were willing . . that the federal parliament should alone legislate in respect thereto." Historical reason of scheme of distribution of powers in B.N.A. Act.

[1] 24 S.C.R. at pp. 232-4, (1895).

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26. Sections 91 and 92 of the British North America Act purport to make a distribution of legislative powers between the Parliament of Canada and the Provincial Legislatures, [subject to the provisions of the Act itself], section 91 giving a general power of legislation to the Parliament of Canada, [within the territorial limits of the Dominion], subject only to the exception of such matters as by section 92 are made the subjects upon which the Provincial Legislatures are exclusively to legislate.[1]

The great importance of that feature of the constitution, whereby a general undefined and unrestrictive power to make laws for the peace, order,[2] and good government of Canada, in relation to matters not coming within the classes of subjects by the British North America Act assigned exclusively to the provincial legislatures, is vested in the Dominion parliament, is obvious. The words of the

The general legislative power of Dominion parliament.

[1] See the first footnote to Propositions 27 and 28, *infra*.

[2] As to the significance of the word "order" here, see *supra* p. 214, n. 1. In the corresponding Quebec Resolution (No. 29) the words used were "peace, welfare, and good government," which were also the words used in respect to the law-making power in the Royal Proclamation of 1763, (3 Cart. at p. 449, note), in the "Quebec Act," 14 Geo. III., c. 83, s. 12, (3 Cart. at p. 454), in the Constitutional Act of 1791, 31 Geo. III., c. 31, s. 2, (3 Cart. at p. 459), and also in the Union Act of 1840, 3-4 Vict., c. 35, s. 3, (3 Cart. at p. 482). It is clear, therefore, that the substitution of the word "order" for "welfare" was done advisedly.

Proposition, with the exception of those in brackets, are taken from the judgment of the Privy Council in Dow *v.* Black.[1] But in Valin *v.* Langlois[2] their lordships likewise say:—"That which is excluded by the 91st section from the jurisdiction of the Dominion parliament is not anything else than matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces;" while in Russell *v.* The Queen,[3] dealing with the Canada Temperance Act, they say:—"If the Act does not fall within any of the classes of subjects in section 92, no further question," (*sc.*, as to its validity), "will remain, for it cannot be contended, and indeed was not contended, at their lordships' bar, that if the Act does not come within one of the classes of subjects assigned to the provincial legislatures, the parliament of Canada had not, by its general power 'to make laws for the peace, order, and good government of Canada,' full legislative authority to pass it." Lastly, in Bank of Toronto *v.* Lambe,[4] their lordships state that they adhere to the view "which has already been taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the Parliament."

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Valin *v.* Langlois.

Russell *v.* The Queen.

Bank of Toronto *v.* Lambe.

It is in propounding the view of the constitution expressed in the above dicta that the Judicial Committee have brought upon themselves the vehement criticism, not to say denunciation, of Judge Travis in his treatise on The Constitutional

Judge Travis on the Constitution.

[1] L.R. 6 P.C. at p. 280, 1 Cart. at p. 105, (1875).

[2] 5 App. Cas. at p. 120, 1 Cart. at p. 163, (1879).

[3] 7 App. Cas. at p. 836, 2 Cart. at p. 19, (1882).

[4] 12 App. Cas. at p. 588, 4 Cart. at pp. 23-4, (1887).

Prop. 26 Powers of Parliament and of the Local Legislatures under the British North America Act,[1] published after Russell *v.* The Queen, and before Bank of Toronto *v.* Lambe. Judge Travis, however, would seem to have very much misread the judgments of their lordships, the true effect of which a brief consideration of his comments, with those of Mr. Justice Loranger, in the pamphlet already several times referred to,[2] may serve to make manifest.

Judge Travis' criticisms of Privy Council decisions.

It must be first pointed out, however, that in some places in his treatise Judge Travis speaks as though he understands their lordships as holding that any Act which a single provincial legislature could not pass, the Dominion parliament could pass, which, it is submitted, is not their holding at all;[3] while in other places he speaks as understanding them to mean that any legislation which neither a single provincial legislature, nor more than one acting conjointly, could enact, the Dominion parliament could enact, and this, with submission, is what they certainly do hold.[4] Thus he says that,[5] "unless the language of the Privy Council is unintelligible," they hold that "with reference to an Act of Parliament it is necessarily *intra vires* Parliament, because it is an Act that the local legislature of a province cannot pass;" while, elsewhere,[6] he

[1] St. John, N.B., 1884, esp. at p. 135, *et seq.* The same principle was, he considers, (p. 174), "foreshadowed and, in effect, acted on" in Dobie *v.* The Temporalities Board, 7 App. Cas. 136, 1 Cart. 351, (1882).

[2] Letters upon the Interpretation of the Federal Constitution, Quebec, 1884.

[3] See Proposition 33 and the notes thereto.

[4] See Proposition 27 and the notes thereto.

[5] *Ad loc. cit.*, p. 140.

[6] P. 154.

speaks of them as holding "that all Acts that the local legislatures, alone or conjointly, cannot pass can be passed by Parliament," and he submits[1] that "there are Acts which the local legislatures cannot enact, and which the parliament of the Dominion cannot enact either."[2] And referring to their lordships' judgment in Dobie *v.* The Temporalities Board,[3] and what he considers the effect of it, he says[4]:—"If by simply grouping two or more provinces together, an Act relating to property and civil rights in those provinces is *intra vires* Parliament, . . the principle does not stop there; but, carried to its legitimate sequence, it sweeps away almost every vestige of legislative power that the legislatures possess. . . By simply adding two provinces together, Parliament, by the same principle, could as well legislate on the solemnization of marriage. . . and on virtually all the other subjects in section 92, as it could on property and civil rights, under the holding in Dobie *v.* The Temporalities Board."

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Dobie *v.* The Temporalities Board.

Judge Travis' criticisms.

Then, reverting apparently to the misconception already pointed out, he asks[5]:—"New Brunswick

[1] At p. 149.

[2] Cf. per Henry, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 546, 2 Cart. at p. 43, (1880):—"It is contended that inasmuch as the local legislatures could not provide as is done by this Act, Parliament necessarily must have the power it exercised. The Proposition, as a general one, must be admitted, but there may be, and, I think, there are, exceptions, and that this," (referring to the Canada Temperance Act, 1878), "may fairly be considered one of them." And the same learned judge speaks again in a similar manner in Attorney-General *v.* Mercer, 5 S.C.R. at pp. 656-7, 3 Cart. at p. 43, (1881), and in Queddy River Driving Boom Co. *v.* Davidson, 10 S.C.R. at p. 236, 3 Cart. at p. 258, (1883). And so per Weatherbe, J., in The Queen *v.* Ronan, 23 N.S. at p. 448, (1891), and per Meagher, J., S.C. at p. 460. But see per Henry, J., himself, in Valin *v.* Langlois, 3 S.C.R. at p. 65, 1 Cart. at p. 201, (1879).

[3] 7 App. Cas. 136, 1 Cart. 351, (1882).

[4] At p. 154.

[5] At pp. 166-7.

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could not pass an Act to raise a revenue for provincial purposes from tavern licenses in New Brunswick and Nova Scotia, could Parliament do it? New Brunswick could not pass an Act on solemnization of marriage, pure and simple, for New Brunswick and Nova Scotia, could Parliament do it?" and so on.

Dobie v. The Temporalities Board.

Now, in the first place, in Dobie *v.* The Temporalities Board,[1] their lordships especially point out that, in their opinion, the provincial Act under consideration did not fall within any of the classes enumerated in section 92, and thereby assigned to the provincial legislatures; and that it did not, in their view, "deal directly with property and civil rights, but with the civil rights of a corporation, and of individuals, present or future, for whose benefit the corporation was created and exists," and that "the corporation and the corporate trust, the matters to which its provisions relate, are in reality not divisible according to the limits of provincial authority," and that therefore it was difficult to understand how the maxim *juncta juvant* was applicable, for[2]:—"If the legislatures of Ontario and Quebec were allowed jointly to abolish the Board of 1858, which is one corporation in and for both provinces, they could only create in its room two corporations, one of which would exist in and for Ontario and be a foreigner in Quebec, and the other of which would be foreign to Ontario, but a domestic institution in Quebec." Hence it is clear that their lordships by no means there held, as Judge Travis represents, that Parliament could pass an Act directly relating to property and civil rights in the provinces of

[1] 7 App. Cas. 136, 1 Cart. 351, (1882).

[2] 7 App. Cas. at p. 152, 1 Cart. at p. 371.

Ontario and Quebec,[1] or that legislative power over that subject, or rather subjects, did not lie in the united jurisdictions of the legislatures of those two provinces. They were not dealing with an Act upon matters coming within the classes of subjects enumerated in section 92 at all. And, secondly, their lordships nowhere say that because no single province can pass an Act in relation to the classes of matters enumerated in section 92, but embracing another province as well as itself, therefore Parliament can do so.[2] Their lordships, however strictly their language may be construed, do not say that power so to legislate by a single Act, or by Acts of any single legislative body, exists anywhere;[3] what they do say is that legislative power over such sub-

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Dobie *v.* The Temporalities Board.

[1] If their lordships had so held, it would have been difficult to account for the form of section 94 of the British North America Act, the intent of which, it is submitted, is to provide that Parliament may do what, under sections 91 and 92 alone, it could not do, namely, legislate directly for the purpose mentioned upon property and civil rights, and legal procedure in civil matters, in the provinces named, but still subject to the restriction that such Dominion Act should not have effect in any such province unless adopted as law by the provincial legislature, after which the power of Parliament to legislate in relation to any matter comprised in any such Act should be unrestricted. And see per Strong, V.C., in *Re* Goodhue, 19 Gr. at p. 452, 1 Cart. at p. 573, (1872), and Proposition 68 and the notes thereto.

B.N.A. Act, sect. 94.

[2] In the argument in Hodge *v.* The Queen, before the Privy Council, in 1883, (Dom. Sess. Pap., 1884, Vol. 17, No. 30, at p. 27), Sir Arthur Hobhouse, one of the Board, observes:—"Russell *v.* The Queen does not intend to decide that if the subject is one attributed to the provincial legislature, the Dominion can get seizin of it by extending the extent of it beyond the provinces;" and no dissent is expressed to this by any of their lordships. And see the notes to Propositions 27 and 28, *infra*. See, also, Proposition 33 and notes thereto.

[3] In this sense it is no doubt quite true, as Mr. Edward Blake says in his argument in St. Catharines Milling and Lumber Co. *v.* The Queen, sometimes termed the Ontario Lands case, that:—"Inherent in the federal form there is with its advantages, great as they are, what may be deemed a defect,—it has the defects of its qualities; and there are some things which cannot at all be done, or at any rate done by the central authority in a federal union, which cannot at all be done *modo et formâ* in which they may be done in a legislative union:" see this argument as printed by the press of "The Budget," 64 Bay Street, Toronto, 1888, at p. 8. And so per Sedgewick, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 241, (1895), whose views conflict with those of Hughes, C.J., in Clemens *v.* Bemer, 7 C.L.J. at p. 127, (1871), *q.v.*

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ject, or rather subjects, exists somewhere, for "the Federation Act exhausts the whole range of legislative power," and where it exists, it is submitted, clearly is in the different provincial legislatures legislating in concert each for its own province.[1]

Loranger, J.'s pamphlet.

And if Judge Travis has misread the judgments of the Privy Council in one way, Mr. Justice Loranger, in what may be termed in some respects his rival pamphlet, already several times referred to,[2] has, it is humbly submitted, misread them in another way. For he advances[3] as a line of demarcation between the legislative power of the

[1]When Judge Travis, having disposed of what he terms "the horrid perversion" of the British North America Act by the Privy Council, proceeds himself to formulate "tests to be applied in order to decide whether an Act is *intra vires* Parliament or not," he does so in terms which are very confused, and certainly throw no light upon the words of the Act, so far as the opening words of section 91 are concerned. They are, as put at pp. 150-1 of the treatise, as follows:—"Does the Act in question, *bonâ fide*, and as legitimate legislation on the subjects-matter in question, come within any of the subjects-matter enumerated in or covered by section 91, that is to say, all matters not coming within section 92, and on the enumerated subjects in section 91, whether they come within the subjects-matter in section 92 or not? If so, then that is good legislation within the power of Parliament, under the express language of the Act." "That," he adds, "we take it, as between sections 91 and 92 of the Act, covers the whole ground." See to like effect at pp. 178-9. It would seem, however, from a general study of his treatise, that Judge Travis' view is that the Dominion parliament can only legislate for the peace, order, and good government of Canada, (save as to matters coming within the classes of subjects enumerated in section 91), provided they do not in such legislation at all touch or interfere with matters assigned to the provincial legislatures under section 92. This, however, would probably be impossible, and thus the opening words of section 91 would be denuded of all practical effect as conferring legislative power. See the notes to Proposition 37. It is scarcely necessary to point out that the Canada Temperance Act, 1878, interfered with the power of the provincial legislatures to legislate for raising a revenue for provincial purposes by means of tavern licenses, and affected property and civil rights in the provinces; but in Russell *v.* The Queen, 7 App. Cas. 829, 2 Cart. 12, (1882), the Judicial Committee held, nevertheless, that it was *intra vires* of the Dominion parliament under its general authority to make laws for the peace, order, and good government of Canada. Cf. per Sedgewick, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 240-1, (1895).

Judge Travis' own views.

[2]Letters upon the Interpretation of the Federal Constitution (first letter), Quebec, 1884.

[3]At pp. 56-7.

provinces and of the Dominion a proposition which is certainly at variance with the Privy Council decisions, to which, however, he does not at all refer, namely, that if a subject-matter "interests," or "affects," less than all the provinces it is local, and must be left to be disposed of by the legislatures, and that it is only if it "affects" or "interests" all the provinces that it is within the competence of Parliament. The Act in question in Dobie *v.* The Temporalities Board[1] affected only two provinces, yet because neither one nor both of those provinces could have given legislative force to its provisions, the Judicial Committee held that the Dominion parliament alone could enact them. Prop. 26 — The general legislative power of Parliament.

The leading Proposition points out that distribution of legislative power which, as Crease, J., says in the Thrasher Case,[2] "may one day, though in the perhaps distant future, expand into national life." Section 91 of the British North America Act, he says in the same case,[3] he has from the first examination into the Act regarded "as the legal keystone of Confederation, without which the whole fabric built up with such exceeding care would infallibly tumble to pieces from absolute lack of power of cohesion." And, again,[4] this section, he says, appears to him "to contain the legal germ of development of the Union in the future, clearly shadowed forth in the early speeches of Sir John Macdonald." And[5] he cites words of Lord Carnarvon, in introduc- The Thrasher Case. Lord Carnarvon.

[1] 7 App. Cas. 136, 1 Cart. 351, (1882). And see Proposition 51 and the notes thereto.

[2] 1 B.C. (Irving) at p. 195, (1882).

[3] At p. 199.

[4] At p. 200.

[5] At p. 202.

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ing the Act into the House of Lords,[1] in reference, as he says, to this 91st section :—" In this is, I think, comprised the main theory and constitution of federal government ; on this depends the practical working of the new system. The real object which we have in view is to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces ; and at the same time to retain for each province so ample a measure of municipal liberty and self-government as will allow, and indeed compel, them to exercise those local powers which they can exercise with great advantage to the community."[2]

Importance of Dominion powers.

It is in the sense of the leading Proposition that, as stated by Ritchie, C.J., in Valin *v.* Langlois[3]:— "The British North America Act vests in the Dominion parliament plenary power of legislation, in no way limited or circumscribed, and as large,

[1]Hans., 3rd Ser., Vol. 185, p. 563.

[2]Crease, J., goes so far as to say (S.C. at p. 199) : — "The very groundwork and pith of the Constitution is that the Dominion is dominus," and that "on this very point of supremacy of the Dominion where federal and provincial laws conflict, and even sometimes where they may concur, in my humble opinion, depends the stability and ultimate success of this great Confederation." It seems indeed to be established law, as expressed in Proposition 46, that where over matters with which provincial legislatures have power to deal provincial legislation directly conflicts with enactments of the Dominion parliament, whether strictly relating to the enumerated classes of subjects in section 91, or by way of provisions ancillary to legislation on the said classes of subjects, the provincial legislation must yield to that of the Dominion parliament ; and this, together with the existence of the federal veto power, which has been treated of in connection with Proposition 10, may be thought to justify such language, notwithstanding that it is equally well established, as shown in the notes to Proposition 61, that if, on due construction of the British North America Act, a legislative power falls within section 92, it is not to be restricted or its existence denied because by some possibility it may limit the range which otherwise would be open to the Dominion parliament.

[3]3 S.C.R. at p. 16, 1 Cart. at p. 173, (1879).

and of the same nature and extent, as the parliament of Great Britain, by whom the power to legislate was conferred, itself had[1];" and that, as Gwynne, J., expresses it in Citizens Insurance Co. *v.* Parsons,[2] the Dominion parliament has "the supreme jurisdiction to legislate upon all subjects whatsoever, except as to certain specific matters particularly enumerated, purely of a local, domestic, and private nature, which were assigned to the provinces."[3] Prop. 26

It was under this general legislative power of the Dominion parliament that the Dominion Act, 31 Vict., c. 76, whereby authority is conferred upon Courts and judges in Canada to make orders for the examination in the Dominion of any witness or party in relation to any civil or commercial matters pending before any British or foreign tribunal, was held to be *intra vires*, in *Ex parte* Smith.[4] It was objected that it was matter of procedure, and therefore within the jurisdiction of the provincial House; but Torrance, J., held that it was "a matter of international comity, and the Act is one upon which the Dominion parliament might very properly pass." Instances of Dominion legislation under the general power.

[1]See, also, Proposition 17 and the notes thereto.

[2]4 S.C.R. at p. 333, 1 Cart. at p. 338, (1880).

[3]So, also, per Fournier, J., in Severn *v.* The Queen, 2 S.C.R. at p. 120, 1 Cart. at p. 464, (1878); per Dorion, C.J., in *Ex parte* Dansereau, 19 L.C.J. at pp. 231-2, 2 Cart. at p. 190, (1875). In The North British and Mercantile Fire and Life Ins. Co. *v.* Lambe, (Bank of Toronto *v.* Lambe), M.L.R. 1 Q.B. at p. 166, 4 Cart. at p. 60, (1885), Tessier, J., draws an inference in favour of a liberal interpretation of provincial powers from the fact that the special powers of the Dominion parliament in certain cases are specified in section 91 of the British North America Act, "as in a treaty between two independent parties which specifies the rights belonging to each of the two," instead of the section merely defining the powers of the provincial legislatures, and then saying that all other powers belonged to the federal parliament. But it is submitted that the specification of certain powers of Parliament in section 91 was made rather in the interest, if one may so say, of Parliament than of the provinces: see *supra* p. 308, n. 1.

[4]16 L.C.J. 140, 2 Cart. 330, (1872).

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To it also, in Canadian Pacific R.W. Co. *v.* Northern Pacific R.W. Co.,[1] Killam, J., says may be attributed the provision of the General Railway Act of Canada, 51 Vict., c. 29, that no provincial railway shall cross a Dominion railway without making application to the Railway Committee of the Privy Council of Canada, though he suggests that it may also be upheld as incidental to the powers of the Dominion parliament to authorize the construction of certain railways.

Powers of parliament are subject to provisions of B.N.A. Act itself.

Of course, as the leading Proposition indicates,[2] the powers conferred upon the Dominion parliament are subject to the express provisions of the British North America Act. For example, as put by O'Connor, J., in Gibson *v.* M'Donald[3]:—"The exclusive right to appoint the judges is reserved to, and vested in, the government of the Dominion, and even the parliament of the Dominion cannot divest the government of that power, for it cannot

[1] 5 M.R. at p. 313, (1888). The Canada Temperance Act, 1878, of course affords the most striking example of the exercise of the general powers of Parliament: see p. 311, *supra*. It would seem, also, that it must have been under them that the law officers of the Crown in England held, as stated in a despatch from the Secretary of State, of March 29th, 1877, that it could empower the Lieutenant-Governor of Nova Scotia to alter the Great Seal of the province, and also could validate the past use of the old Great Seal of the province after and contrary to the injunctions of a royal warrant, directing, in 1869, the use in future of a new seal and the return of the old seal, and could make good all documents passed under it; though Mr. Edward Blake, as Minister of Justice, doubted whether it had such power: Can. Sess. Pap., 1877, No. 86, pp. 48-9. And see *supra* p. 115, note. The despatch there referred to (of August 23rd, 1869) says:—"I am advised that, the assent of the Crown being first obtained, local Acts afterwards assented to by the Crown would be a legal mode of empowering this alteration," (*sc.*, of the provincial Great Seal), "to be made in those provinces where it is not at present legal;" it would seem from the later despatch above referred to, that by "local Acts" here was probably meant Dominion Acts, and not provincial Acts, as stated *supra* p. 115, note. Nevertheless, it is submitted upon the authorities cited in the notes to Propositions 7, 8, and 9, that such power would belong to the provincial legislatures.

Nova Scotia Great Seal case.

[2] And cf. *supra* pp. 238-41, 250-1.

[3] 7 O.R. at p. 419, 3 Cart. at p. 328, (1885). As to removal of judges, see *supra* p. 128, n. 1.

so change the British North America Act." And so in the matter of the Grand Trunk R.W. Co., the Credit Valley R.W. Co., and the Northern R.W. Co.,[1] Taschereau, J., held in the Supreme Court of Canada that section 101 of the British North America Act gives the Dominion parliament power to grant an appeal from provincial Courts of last resort only, and that, therefore, 42 Vict., c. 39, s. 6, D., was *ultra vires*.[2] And there are, of course, other ways in which, as Wilson, J., says in Regina *v.* Taylor,[3] "from the inherent condition of a dependency," the powers of the Dominion parliament are "necessarily and impliedly restricted."[4] Prop. 26

Powers of Parliament do not extend beyond territorial limits of Canada.

Again, as the leading Proposition also indicates, the legislative powers of the Dominion parliament do not, any more than those existing in any other country, extend beyond its own territory ;[5] and here

[1] Doutre's Constitution of Canada, at pp. 337-9.

[2] See further, as to section 101, McLaren *v.* Caldwell, 3 C.L.T. 343, (1883); also 11 C.L.T. at p. 147; and an article on the power of provincial legislatures to limit appeals to the Supreme Court, 2 C.L.T. 416.

[3] 36 U.C.R. at p. 191, (1875).

[4] As to the Imperial veto power, see *supra* at pp. 202-3; as to the sovereign authority of the Imperial parliament generally, see Proposition 12 and the notes thereto; as to control by Imperial treaties, see *supra* pp. 255-9.

[5] "The statutes of this realm have no power, are of no force, beyond the dominions of Her Majesty, not even to bind the subjects of the realm, unless they are expressly mentioned, or can be necessarily implied, and I apprehend it becomes, therefore, a rule in construing a statute not to extend its powers beyond the realm, whether to create a disability or to confer a privilege :" per L. C. Baron Pollock, Jeffery *v.* Boosey, 4 H.L.R. at p. 939, (1854). "Statutes must be understood in general to apply to those only who owe obedience to the laws, and whose interests it is the duty of the legislature to protect. Natural-born subjects, and persons domiciled or resident within the Kingdom, owe obedience to the laws of the Kingdom, and are within the benefits conferred by the legislature :" per Jervis, L.J., S.C. at pp. 946-7. Cf. per Lord St. Leonards, S.C. at p. 955, who adds :—"When I say that the legislature must *primâ facie* be taken to legislate only for its own subjects, I must be taken to include under the word 'subjects' all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance." And so per Parke, B., S.C. at p. 926, and Lord

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we are introduced to a subject to which certain recent decisions in England, and in the province of Ontario, have lent a special interest. The matter can, however, be but briefly dealt with in this work, and, indeed, the law in regard to it may not be completely, in all points, settled.

Different classes of extra-territorial laws.

It seems convenient to make a threefold distinction between the different classes of what may be termed extra-territorial statutes which have come into question in the reported cases, and to treat separately of them, as follows:—

1. Statutes relating to the removal of persons from the territory of the law-maker.

2. Statutes purporting to affect and control the civil rights and property of foreigners residing outside the territory of the law-maker, or, in the case of British colonies, the civil rights and property of foreigners or British subjects, residing outside the colony.

3. Statutes purporting to bring under the criminal laws of the territory of the law-maker acts done outside that territory.

Upon each of the above classes of statutes I propose to make a few observations. It is, however, important to remember with regard to all of them that a statute may be valid within the territory of the law-maker, and such as to bind the Courts there, and yet may not be such that foreign countries or foreign

Brougham, S.C. at p. 970. See, also, Macleod *v.* Attorney-General of New South Wales, [1891] A.C. 455, *infra* pp. 336-8; and Clement's Canadian Constitution at pp. 185-6, and cases there cited. And so in the Australian case of Regina *v.* Call, *Ex parte* Murphy, 7 V.L.R., L. at p. 118, (1881), Stawell, C.J., says that it is the duty of the Court to assume, unless the contrary is expressly conveyed, that parliament," (*sc.*, the colonial legislature), "has not attempted to exceed their territorial limits of legislation." Cf. per Stephen, J., S.C. at p. 120.

Courts of justice will recognize it, or judicial decrees obtained under it, either because it offends against international law, or for other reasons. But with regard to the first of the above classes of statutes a further distinction should, it would seem, be drawn between expelling or banishing from the territory of the law-maker, and transporting to another country,[1] the latter necessarily involving restraint of the person when outside the territory of the law-maker. The former would seem open to no sort of legal objection, while it is otherwise as regards the latter. Leonard Watson's case[2] would, indeed, seem, from the headnotes of the reports of it, an authority to show that even the latter power exists. It was a proceeding by way of habeas corpus in connection with the transportation to Van Diemen's land, under authority of an Act of the legislature of Upper Canada, 1 Vict., c. 10, of a number of Canadian prisoners, who had been concerned in the late insurrection, and were then confined in England on their way to that place. In Adolphus and Ellis the headnote reads :—"The provincial legislature under Imp. 31 Geo. 3, c. 31,[3] had the power to pass laws for transportation *extra fines*, which power is recognized in Imp. 5 Geo. 4, c. 84, s. 17;"[4] while in Perry

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Laws authorizing expulsion or transportation.

Leonard Watson's case.

[1] It would seem that the supreme power of every state has a right to make laws for the exclusion or expulsion of a foreigner: *In re* Adam, 1 Mo. P.C. 460, at p. 471, (1837); Toy *v.* Musgrove, 14 V.L.R. 349, [1891] A.C. 272.

[2] 9 A. & E. 731, (1839). S.C., *sub nom.* Queen *v.* Batchelor, 1 P. & Dav. 516.

[3] The Constitutional Act. Section 2 enacts that His Majesty, by and with the advice and consent of the Legislative Council and Assembly of the province of Upper Canada, and of Lower Canada, respectively, shall have power "to make laws for the peace, welfare, and good government thereof."

[4] This enactment recites that "by the laws in force in some parts of His Majesty's dominions not within the United Kingdom, offenders convicted of certain offences are liable to be punished by transportation be-

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and Davison, the headnote reads: — "Held that the return was not bad for any of the following objections:—. . That the colonial legislature could not authorize transportation *intra fines* of another territory." But on perusing the case we find that Lord Denman, C.J., who delivered the judgment of the Court of Queen's Bench on this part of the case, merely says[1] that Imp. 5 Geo. 4, c. 84, s. 17, proves the frequency of transportation from certain colonies for criminal offences; and he does not specifically refer to the objection taken by counsel for the prisoners, that the colonial legislature could not "authorize transportation and detention beyond the bounds of the province."[2] And even if it be assumed that the Court accepted to the full the argument of counsel for the Crown in the case, that argument appears to rest upon the effect of the Imperial Act, 14 Geo. 3, c. 83, s. 11,[3] importing the criminal law of England into Canada, and upon the recognition by the later Imperial Act, 5 Geo. 4, c. 84, s. 17, above referred to, of colonial laws authorizing transportation in criminal cases.[4] In no view does Leonard Watson's case carry the matter beyond the power of the legislature of Upper Canada to legislate for transportation in

Leonard Watson's case.

yond the seas," and enacts that any such convicts as shall have been brought to England in order to be transported may be there imprisoned until transported.

[1] 9 A. & E. at pp. 783-4, 1 P. & Dav. at pp. 547-8.

[2] 9 A. & E. at p. 767.

[3] The Quebec Act. The section provides that the criminal law of England "shall be observed as law in the province of Quebec, as well in the description and quality of the offence, as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted," etc.

[4] 9 A. & E. at p. 754; 1 P. & Dav. at p. 536. Cf. The Canadian Prisoners' case, 5 M. & W. at p. 46, and Queen *v.* Mount, L.R. 6 P.C. at pp. 301-2, (1875). In Leonard Watson's case, counsel for the prisoners admitted that the colonial legislature might banish a man out of its own country, but maintained that it could not transport him *intra fines* of another country.

criminal cases, such power being rested upon special recognition by the Imperial parliament.[1] Prop. 26

Laws authorizing transportation.

In 1839, about the time of the decision in Leonard Watson's case, the law officers of the Crown in England gave an Opinion upon the legality of an ordinance passed by the Governor and Council of Lower Canada, under an Imperial Act authorizing them to make such laws or ordinances for the peace, welfare, and good government of the province of Lower Canada as the legislature of Lower Canada as then constituted was empowered to make, and which ordinance directed certain persons to be transported to Bermuda and detained there. The law officers expressed the view that the power to banish existed, but that, "with respect to that part of the ordinance which is to be executed beyond the limits of the province of Lower Canada, we are of opinion that it would acquire no force by being confirmed by Her Majesty."[2] Boyd, C., refers to this Opinion in Regina *v.* Brierly,[3] saying that it "is evidently based upon the general rule that the laws of a colony cannot extend beyond its territorial limits, as expressed more recently in Low *v.* Routledge,"[4] a case presently to be again referred to. He adds:—"The law officers considered part of the ordinance invalid, because it attempted to justify restraint of the person beyond the confines of the

Opinion of law officers of the Crown.

Reg. v. Brierly.

[1]The way in which in Leonard Watson's case the prisoners were delivered up by Her Majesty's representative in Upper Canada to her representative in Lower Canada, and by him to the executive government in England, illustrates the unity and indivisibility of the Crown throughout the Empire. See *supra* pp. 81-6.

[2]Forsyth's Cases and Opinions on Constitutional Law, at pp. 465-6.

[3]14 O.R. at p. 534, (1887). Ferguson, J., also refers to it, S.C. at pp. 542-3. This case will be more particularly referred to in connection with the third division of the subject under discussion.

[4]L.R. 1 Ch. at p. 47.

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province, and in another colony, in the case of political offenders deported without trial before any tribunal. Whether that conclusion may not be affected by the case of Leonard Watson,[1] so as to justify a qualified or provisional restraint without the province, I need not pause to consider."

Sir John Macdonald.

Quite in accordance with the view that a colonial legislature cannot authorize constraint of the person beyond the limits of the colony is the report as Minister of Justice of Sir John Macdonald of August 25th, 1873,[2] in which he pronounced an Ontario enactment (36 Vict., c. 31, s. 29) objectionable which empowered the Lieutenant-Governor by his warrant to authorize the removal of any insane person who had come or been brought into the province back to the province or country from which he had been brought. He says:—"It is believed that the provincial legislature has no power to authorize any such extradition. For the purpose of authorizing an insane or any person to be removed from one province of the Dominion to another, legislation must be procured from the parliament of Canada, and for the purpose of removing out of the Dominion an Act must be passed by the Imperial parliament."

An Australian authority.

So in the Australian case of Ray *v.* McMackin,[3] the Supreme Court of Victoria held that though the legislature of a colony might authorize the exclusion from its territory of a person charged with an offence in another colony, or that he be punished unless he leaves the territory, it cannot authorize the sending him in custody out of its territory into another colony, and they refused to recognize as

[1] 9 A. & E. 731, 1 P. & Dav. 516, (1839).

[2] Hodgins' Prov. Legisl., Vol. 1, p. 73.

[3] 1 V.L.R., L. 274, (1875).

valid a statute of the colony of New South Wales assuming so to do. Barry, J., says :—"The power of extradition from any part of the British dominions to another, or from any part of them to those of a foreign power by treaty, requires the sanction of the Imperial parliament."[1] In the subsequent Victorian case, indeed, of Regina *v.* Call, *Ex parte* Murphy,[2] Higinbotham, J., held that though the Act of the Victoria legislature which he was then considering did authorize in certain cases the imprisonment of a person beyond the geographical limits of Victoria, and that, "as a matter of abstract speculation, the legislature of Victoria had no jurisdiction beyond these limits," yet the law was nevertheless binding on Victorian Courts and magistrates, but this view

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[1] At p. 281. So in The Brisbane Oyster Fishery Co. *v.* Emerson, Knox, (N.S.W.), at p. 86, (1877), Sir J. Martin, C.J., says, *obiter* :—"Whatever the powers of the Imperial legislature over all British subjects, wherever they are, may be, it cannot be contended for a moment that any colonial legislature can bind persons residing out of its colony. This difficulty has been practically felt wherever it has been proposed to establish a colonial navy, inasmuch as our legislature has no coercive jurisdiction outside the limits of our own territory." And it would appear that on the question being raised before the Supreme Court of New Zealand in 1879, "it was adjudged that the colonial legislature had no power to authorize the conveyance on the high sea to another colony, and the detention outside its own jurisdiction of any person whatsoever. Such power must be exercised, or expressly conferred on the local legislature, by Imperial enactment :" Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 303, *q.v.* In a debate in the House of Lords, on April 16th, 1875, upon the exercise of the prerogative of pardon in colonies enjoying responsible government, a case being mentioned where the governor of New South Wales had commuted a sentence of imprisonment conditionally on the offender absenting himself from the Australian colonies, Lord Carnarvon, Secretary of State for the Colonies, observed :—"The colony, as a part of the Empire, had no right to transport a criminal to another part of the Empire." To which Lord Belmore, who had been governor of New South Wales, replied that :—"There was difference between exile and transportation. Nobody in New South Wales ever supposed that a governor could transport, but he could pardon on condition of a prisoner exiling himself for the remainder of the term of his sentence :" Hans., 3rd Ser., Vol. 223, at p. 1074. Imp. 6-7 Vict., c. 34, provides that offenders charged with certain felonies may be apprehended by virtue of a warrant issued as therein mentioned in any part of Her Majesty's dominions, and may be sent to the place where the offence was committed.

Laws authorizing detention of the person *extra fines*.

[2] 7 V.L.R., L. at p. 118, (1881).

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has been already adversely commented on.[1] It seems clear that if the limitation to the powers of colonial legislatures indicated in the above authorities, which it will be observed are not of the highest order, really exists, even in respect to the colony's own subjects,[2] it must rest upon the proper interpretation of the fundamental laws under which such powers are derived, and not upon any rules of international law, and the same remark applies to all other kinds of extra-territorial laws in their application to subjects of the law-maker.

Laws affecting rights and property of persons abroad.

Proceeding now to the second division of the subject above mentioned, namely, statutes purporting to affect and control the civil rights and property of persons residing out of the territory of the law-maker, the point decided in Low *v.* Routledge[3] is that a colonial legislature cannot affect an alien's rights beyond the limits of the colony. There the plaintiff, an alien, temporarily resident in Montreal, claimed to be entitled to copyright under the Imperial Copyright Act, 5-6 Vict., c. 45, in respect to a book she was publishing in England, and it was unsuccessfully contended that she could not be so entitled because by a Canadian statute an alien coming into Canada for the purpose of publishing a work, as the plaintiff had done, and publishing his book there, would not be entitled to copyright in the work so published,

Low *v.* Routledge.

[1] *Supra* p. 263, n. 1.

[2] For a justification of this expression see *infra* p. 329. Boyd, C., says in Reg. *v.* Brierly, 14 O.R. at p. 533, (1887):—"*Quoad* Canada, and as to British subjects resident here, the parliament of Canada has the same authority as that possessed by the Imperial parliament with reference to British subjects throughout the realm;" and it is submitted that this is the necessary conclusion from the authorities upon which Proposition 17 rests, to some of which he refers.

[3] L.R. 1 Ch. 42, (1865). See *supra* pp. 213-6.

and because an alien coming into Canada could acquire only such rights as were given by the law of Canada. Sir G. J. Turner, L.J., however, delivering the judgment of the Court, says[1]:—"This argument on the part of the defendants is, in truth, founded on a confusion between the rights of an alien as a subject of the colony,[2] and his rights as a subject of the Crown. Every alien coming into a British colony becomes temporarily a subject of the Crown,—bound by, subject to, and entitled to the benefit of the laws which affect all British subjects. He has obligations and rights both within and beyond the colony into which he comes. As to his rights within the colony, he may well be bound by its laws; but as to his rights beyond the colony, he cannot be affected by these laws; for the laws of a colony cannot extend beyond its territorial limits."[3] Most of the decisions

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Low *v.* Routledge.

[1]At pp. 46-7.

[2]This expression, "subject of the colony," is significant and important. In an article in 31 C.L.J. 7, entitled "Can a Colonial legislature affix a criminal character to acts committed beyond its territorial limits?" the writer says that "there is no such thing as a Canadian, Australian, or Indian subject;" and in an international sense no doubt this is so; but the above dicta, and other authorities presently to be referred to, (*infra* pp. 332-3), show that in connection with the matters under discussion there is a sense in which it is proper to speak of a man as a subject of a particular colony, and that legal distinctions hinge upon his position as such. See the dictum of Boyd, C., in Regina *v.* Brierly, *supra* p. 328, n. 2.

[3]It would seem that the status of individuals resident in the colonies must be determined by the law of England, but the rights and liabilities incidental to such status must be determined by the laws of the colony: *In re* Adam, 1 Mo. P.C. 460, (1837); Donegani *v.* Donegani, 3 Kn. at p. 85, (1835); Regina *v.* Brierly, 14 O.R. at p. 533, (1887). The status in question in *In re* Adam, and Donegani *v.* Donegani, was that of an alien. The principle thus laid down may be the one governing the curious case put by Stephen, J., in *In re* Victoria Steam Navigation Board, 7 V.L.R., L. at p. 265, (1881), of a colonial Act assuming to affect the status of an English barrister in the colony, by enacting that "if an English barrister committed a certain offence he was not an English barrister in Victoria." The learned judge suggests that such an Act would be *ultra vires* "by the comity which exists between States." But it is sub-

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to be noticed in connection with this part of the subject, however, have to do with statutes authorizing the initiation of legal proceedings against defendants absent from the territory of the law-maker, and a consideration of these cases brings prominently into notice the distinction, already referred to, between the question whether such statutes are valid and binding within the territory and upon the Courts of the law-maker, and the question whether foreign Courts will recognize them, and judgments obtained in such legal proceedings initiated under them ; and, with regard to the latter question, the difference between the position of those who are in some sense subjects of the law-maker, and of those who are not. Thus, in the recent case of Ashbury *v.* Ellis,[1] the Privy Council held that under the power given to it by Imp. 15-16 Vict., c. 72, " to make laws for the peace, order, and good government of New Zealand," the legislature of that colony could subject to its tribunals persons who were neither by themselves nor their agents present in the colony in actions founded on any contract made or entered into or wholly or in part to be performed within the colony, for[2]:—" Their lordships are clear that it is for the peace, order,

Laws authorizing legal proceedings against absent defendants.

Ashbury *v.* Ellis.

The Privy Council.

mitted this is no ground for holding a colonial Act to be *ultra vires*. See Propositions 17 and 21. Mr. Clement (Canadian Constitution, pp. 187-8, *q.v.*; see, also, *ib.* p. 193) expresses the view, citing, however, no direct authority on the point, that it is incompetent for a colonial legislature to affect civil rights "accrued" abroad, as by enacting that in a civil action in respect to contracts made abroad, to be performed abroad, the colonial law should govern. He also notices the doubts existing as to how far such limitations of colonial power apply to the case of persons domiciled in the colony, as to which see *infra* pp. 332-3, and Can. Leg. Ass. Journ., 1846, p. 29, referred to Todd's Parl. Gov. in Brit. Col., 2nd ed. at p. 175.

[1][1893] A.C. 339. 17 L.N. 172, *et seq.*, contains an article commenting on this case.

[2]At p. 344.

and good government of New Zealand that the Courts of New Zealand should in any case of contracts made or to be performed in New Zealand have the power of judging whether they will or will not proceed in the absence of the defendant." They[1] reject the contention "that the moment an attempt is made by New Zealand law to affect persons out of New Zealand, that moment the local limitations of the jurisdiction are exceeded, and the attempt is nugatory;"[2] but they add, and this shows the importance of the distinction above referred to:—"It was said that a judgment so obtained could not be enforced beyond the limits of New Zealand, and several cases of suits founded on foreign judgments were cited. Their lordships only refer to this argument to say that it is not relevant to the present issue. When a judgment of any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country with regard to all the circumstances of the case. For trying the validity of New Zealand laws,

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Ashbury v. Ellis.

[1] At p. 341.

[2] In a despatch of October 29th, 1874, to the Governor-General of Canada, quoted by Mr. Todd (Parl. Gov. in Brit. Col., 2nd ed. at p. 183), the Secretary of State for the Colonies wrote:—"It is obvious that if the intervention of Her Majesty's government were liable to be invoked whenever Canadian legislation on local questions affect, or is alleged to affect, the property of absent persons, the measure of self-government conceded to the Dominion might be reduced within very narrow limits. It is to the Dominion government and legislature that persons concerned in the legislation of Canada on domestic subjects and its results must have recourse." In Regina v. Call, *Ex parte* Murphy, 7 V.L.R., L. at p. 123, Higinbotham, J., says:—"The provision for the service of writs of summons within fifty miles of the frontiers of Victoria; the attachment in Victoria of the property of an absent defendant, and the Prevention of Influx of Criminals Act, are instances amongst others which could be cited of interference by the Victorian legislature with persons or property beyond the territorial limits." In Bank *v.* Orrell, 4 V.L.R., L. 219, (1878), the Court held that it must obey the legislature as regards a provision of the Victorian Common Law Procedure Act, 1865, giving power to serve a writ of summons on a foreigner out of the jurisdiction. See, however, *supra* p. 263, n. 1.

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it is sufficient to say that the peace, order, and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand."[1]

Laws authorizing legal proceedings against absent defendants.

But the two somewhat old cases of Buchanan *v.* Rucker[2] and Becquet *v.* MacCarthy are authorities for saying that where the defendant against whom a judgment has been obtained in a colonial Court under such local Acts as we have been considering, authorizing service of process *in absentem*, is, or even has been, subject to the jurisdiction of the colony, such judgment will be recognized in the Courts in England where otherwise it would not be. Thus in the former, where a law of the island of Tobago, a British colony, enacted that if a defendant be absent from the island he might be summoned by nailing up a copy of the declaration at the Court-house door, and this should be deemed good service, Lord Ellenborough, C.J., held that on a fair construction of the Act this must be intended to apply to one who had been present and subject to the jurisdiction; and that if it had been meant to reach strangers to the jurisdiction, it would not have bound them, for:—"Can the island of Tobago pass a law to bind the rights of the whole world?" In Becquet *v.* MacCarthy the law of a British colony provided that in a suit instituted against an absent

[1]The rules of international law governing the recognition by Courts of Justice of decrees pronounced *in absentem* by foreign Courts do not come within the scope of this work, but it may be mentioned that they are lucidly summarized by Lord Selborne in the recent case of Sirdar Gurdyal Singh *v.* Rajah of Faridkote, [1894] A.C. 670. As to Courts in England taking judicial notice of legal proceedings in Upper Canada, see per Lord Denman, C.J., in Leonard Watson's case, 9 A. & E. at pp. 782-3.

[2]9 East. 192, 1 Camp. 63, (1808).

[3]2 B. & Ad. 951, (1831).

party the process might be served upon the colonial Attorney-General, and it was held not so contrary to natural justice[1] as to render void a judgment obtained against a party who had resided within the jurisdiction of the Court at the time the cause of action accrued, but had withdrawn himself before the proceedings were commenced. However, as pointed out in Don *v.* Lippmann[2] and Sirdar Gurdyal Singh *v.* Rajah of Faridkote,[3] the defendant in Becquet *v.* MacCarthy held a public office in the colony in which he was sued, and at the time he was sued, and the cause of action arose out of, or was connected with, it. On the other hand, in Cavan *v.* Stewart,[4] Lord Ellenborough held that a party in England was not bound by a colonial judgment, unless it appeared either that he was summoned, or unless it was at least proved that he was "once on the island," the colony in question being Jamaica. This, he said, was "clear on every principle of justice."[5] Prop. 26

Proceeding to the third and last division of extra-territorial laws above mentioned, they are those purporting to bring under the criminal law of the Extra-territorial criminal laws.

[1]With reference to this appeal to natural justice, it must be remembered that the law of the Empire used to be, as stated by DeGrey, C.J., in Fisher *v.* Lane, 3 Wils. 297, at p. 303, (1772), that the colonies might not make any law contrary to the principles of justice. See *supra* p. 284, n. 2.

[2]5 Cl. & F. 1, at p. 21.

[3][1894] A.C. at p. 685.

[4]1 Stark. N.P. 525, (1816).

[5]As to the recognition in English Courts of the binding force of valid colonial legislation, see Philips *v.* Eyre, L.R. 4 Q.B. 225, 6 Q.B. 1; referred to Ray *v.* McMackin, 1 V.L.R., L. at p. 280, (1875). See, also, Proposition 17 and the notes thereto. In Tully *v.* The principal Officers of Her Majesty's Ordnance, 5 U.C.R. 6, (1847), Robinson, C.J., clearly indicates that in his view the provincial parliament could not give a right of action against the Board of Ordnance—"a military department of the Imperial Government domiciled (if I may use the expression), not in Canada, but in England."

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territory of the law-maker acts done outside that territory. In the recent case of Regina *v.* Brierly,[1] the Chancery Divisional Court in Ontario had to consider such an Act, namely, R.S.C., c. 161, s. 4, which enacts that any one who, being married, marries in any part of the world any other person during the life of the former husband or wife, is guilty of felony, provided that he or she is a British subject resident in Canada, and leaves Canada with intent to commit the offence. The Court held the Act *intra vires*. Boyd, C., denies[2] that the law is extra-territorial:—"For it is only intended to affect the man on his return to the Dominion after having committed the offence. Again, it was argued as if it were an interference with the right or duty of the foreign country to punish the offence committed in its precincts. But the statute is restricted to a British subject resident in this country."[3] He further expresses the view[4] that all the objections urged against the statute were for legislative and not judicial consideration, and cites the words of Cockburn, C.J., in Regina *v.* Keyn,[5] that:—"If the legislature of a particular country should think fit by express enactment to render foreigners subject to its law with reference to offences committed

Regina *v.* Brierly.

Laws punishing bigamous foreign marriages.

When local law binding on local Courts,

Though contrary to international law.

[1] 14 O.R. 525, 4 Cart. 665, (1887).

[2] 14 O.R. at p. 532, 4 Cart. at pp. 670-1.

[3] As to this, see *supra* p. 329, n. 2. Although a state takes no cognizance of offences committed beyond its limits and against the laws of another country, it nevertheless can punish the crimes of its own citizens under its own laws, if within their reach, no matter where the crime may have been committed:" Halleck's Intern. Law (London: 1893), at pp. 206-7. See, also, Forsyth's Cases and Opinions on Constitutional Law, pp. 24-5. See, too, Reg. *v.* Giles, 15 C.L.T. 178, (1895), a full report of which will appear in 26 O.R., and which was followed by Ontario Common Pleas, in Reg. *v.* Howard, June 29th, 1895, unreported.

[4] Ferguson, J., seems to have dissented on this point: S.C. 14 O.R. at p. 545, 4 Cart. at p. 682.

[5] 2 Ex. D. at p. 160.

beyond the limits of its territory, it would be incumbent on the Courts of such country to give effect to such enactment, leaving it to the State to settle the question of international law with the governments of other nations."[1] Prop. 26

Now, as to this latter point raised by Boyd, C., the line of distinction, it is submitted, is this:— Where the sole ground of objection to a colonial Act is that it is contrary to international law, such as might be an Act rendering foreigners amenable to the criminal laws of the colony for offences committed abroad, merely because such foreigners were "caught in the colony,"[2] it would nevertheless be incumbent on the Courts of the colony to give effect to the Act, just as much as it is incumbent on Courts in England to give effect to an Act of the Imperial parliament, though open to like objection. Such would seem the necessary conclusion from the authorities on which rest Proposition 17. But where, whether also contrary to international law or not, a colonial Act is outside the scope of the legislative power conferred upon the colony to make laws for the peace, welfare, and good government of the colony, such as might be a law authorizing transportation to another country, in such case even the Courts of the colony would be in duty bound to declare it void, when brought into question before them. So that, as Boyd, C., says[3]:— "In Canada there are but two lines of judicial investigation open in order to determine whether the enactment shall or shall not be obeyed. The

When local law binding on local Courts though extra-territorial.

[1] Cf. Stephen's Hist. of Crim. Law, Vol. 2, pp. 36-7.

[2] As to this expression, see Macleod *v.* Attorney-General of New South Wales, [1891] A.C. at p. 457, presently to be noticed.

[3] 14 O.R. at p. 531, 4 Cart. at p. 669.

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first and chief is, when the question arises whether the statute transcends the powers conferred or invades the limits prescribed by the British North America Act. The second and that of comparatively infrequent occurrence is, when it is needful to determine if the statute is repugnant to Imperial legislation."[1]

Regina *v.* Plowman.

To return, in Regina *v.* Plowman,[2] the Ontario Queen's Bench Divisional Court held the criminal enactment, upheld in Regina *v.* Brierly, to be *ultra vires*, merely saying:—"The Dominion parliament, being a subordinate legislature, has no such power; and that is the effect of the case of Macleod *v.* Attorney-General for New South Wales, [1891] A.C. 455, which covers this case."

Macleod *v.* Attorney-General of New South Wales.

Now, in the last named case, the Privy Council had to consider the validity of a New South Wales enactment similar to the Dominion enactment in question in Regina *v.* Brierly, and Regina *v.* Plowman, except that its application was not on its face restricted to British subjects resident in the colony, and their lordships said[3]:—"If their lordships construe the statute as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that colony. That seems to their lordships to be

[1] Cf. per Palmer, J., in The Queen *v.* The Mayor, etc., of Fredericton, 3 P. & B. at p. 143, *et seq.*, (1879), where he says:—"All that Courts in Canada have a right to do is to decide between the two legislatures as to which of them has the power, and not to deny it to both." But see Clement's Canadian Constitution at p. 192.

[2] 25 O.R. 656, (1894).

[3] [1891] A.C. at pp. 457-8.

an impossible construction of the statute; the colony can have no such jurisdiction. . . Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, '*Extra territorium jus dicenti, impune non paretur*,' would be applicable to such a case. . . All crime is local.[1] The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial legislature have no power whatever. It appears to their lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the colonial legislature to pass;" and they gave the enactment a construction which confined its application to persons amenable at the time of the offence committed to the jurisdiction of the colony, and to offences "wheresoever in the colony committed." It is true, indeed, that their lordships also said that they did not desire "to attribute to the colonial legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law," but it was

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Macleod *v.* Attorney-General of New South Wales.

[1] Mr. Woolsey deals with this subject in his Introduction to the Study of International Law, 5th ed. at pp. 112-4, concluding:—"From this exposition it is evident (1) that States are far from universally admitting the territoriality of crime; (2) that those who go furthest in carrying out this principle depart from it in some cases, and are inconsistent with themselves." As to England, see Stephen's History of Criminal Law, Vol. 2, pp. 12, 23. See, also, Hall's International Law, (Oxford: Clarendon Press, 1890), at pp. 206-9.

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unnecessary for them to consider whether on the wider construction the enactment would have been in such sense *ultra vires* the colonial legislature under the fundamental law of the colony as not to be binding on the colonial Courts. However, the circumstance in this case, which it is submitted makes a vital distinction between it and what was before the Court in Regina *v.* Brierly,[1] and Regina *v.* Plowman,[2] is that on the wider application of the New South Wales Act it was not confined to "British subjects resident in New South Wales," but extended, as their lordships say, "to any person, married to any other person, who marries a second time anywhere in the habitable globe;"[3] and, as a matter of fact, which appears from the report of the case below, though not in the report of it before the Privy Council, the prisoner's domicile was not New South Wales,[4] and he was alleged to have committed the offence charged in the United States of America.[5]

Macleod *v.* Attorney-General of New South Wales.

To return to the leading Proposition, it indicates two important points of difference between the Con-

[1] 14 O.R. 525, 4 Cart. 665, (1887).

[2] 25 O.R. 656, (1894).

[3] [1891] A.C. at p. 457.

[4] "It may be gathered from the evidence that the prisoner's domicile of origin was Scotland, and that at the time he contracted the first marriage he had abandoned such domicile, and became domiciled in New South Wales. Be that as it may, it is clear that he abandoned the New South Wales domicile, if acquired, and thus the domicile of origin again arose. There is no evidence to show that such domicile was ever again abandoned:" per Sir F. Darley, C.J., Regina *v.* M'Leod, 11 N.S.W. at p. 225, (1890).

[5] Mr. Todd (Parl. Gov. in Brit. Col., 2nd ed., pp. 175, 177) mentions two instances of Acts of the late province of Canada being disallowed by the Imperial government as transgressing the territorial limitations of the colony's legislative jurisdiction. See, also, *ib.* at p. 178; Journal of Legislative Assembly of Canada, 1862, p. 101; 31 C.L.J. at pp. 8-9; Peak *v.* Shields, 8 S.C.R. 579, at pp. 596, 600; Clement's Canadian Constitution, pp. 185-93; and on the general subject of the internal jurisdiction of the colonies, see Pownall on the Colonies, ed. 1774, Vol. 2, p. 36, *et seq.*

Points of contrast with the United States Constitution.

stitution of the Dominion and that of the United States. We have seen that in Bank of Toronto *v.* Lambe,[1] the Privy Council reiterate what they had already laid down in several prior judgments, that the Federation Act exhausts the whole range of legislative power. It is the intention of the British North America Act, as Henry, J., puts it in Valin *v.* Langlois[2]:—"To leave no subject requiring legislation unprovided for; and that in the powers given all should be included; and, in the distribution, either Parliament or the local legislatures should deal with every subject."[3] But under the Constitution of the United States, there is a residuum of powers neither granted to the Union nor continued to the States, but reserved to the people, who, however, can put them in force only by the difficult process of amending the Constitution.[4] And in the Queen *v.* The Mayor, etc., of Fredericton,[5] Palmer, J., points out this distinction very clearly as follows:—"It is to be borne in mind that the great and fundamental difference between the American idea of legislative power and the British is that the American is based upon the idea that all such power was in the people alone, and no American legislature has any power to legislate at all, except what is given to them by the people in convention, and expressed in their written Con-

(1) Some legislative powers are possessed neither by Congress nor the State legislatures,

[1] 12 App. Cas. at p. 588, 4 Cart. at pp. 23-4, (1887).

[2] 3 S.C.R. at p. 65, 1 Cart. at p. 201, (1879).

[3] So, also, per Gwynne, J., City of Fredericton *v.* The Queen, 3 S.C.R. at pp. 561, 571, 2 Cart. at pp. 54, 61, (1880); per Taschereau, J., S.C., 3 S.C.R. at p. 557, 2 Cart. at p. 51; per Gwynne, J., Mercer *v.* Attorney-General for Ontario, 5 S.C.R. at p. 701, 3 Cart. at p. 77, (1881); Reg. *v.* Toland, 22 O.R. at p. 507, (1892).

[4] Story on the Constitution of the United States, 5th ed., sections 1906-9; Bryce's Amer. Comm., Vol. 1, pp. 307-8.

[5] 3 P. & B. at p. 143, *et seq.*, (1879).

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stitution; and the people have reserved to themselves a great part of that power, so that many laws no legislature in that country has power to pass; whereas, by the British Constitution, no legislative power exists in the people alone at all, but such wholly exists in . . . the Queen, Lords and Commons, and the . . . concurrence of these three bodies, and these alone, can express the supreme will of the nation, and there is no limit to their power of legislation . . . Therefore, I think it is an important question to every Canadian desirous of the well-being of his country, whether any and what part of these principles have been secured to him by the British North America Act. And if the enacting parts of that Act have left the question doubtful, I think the recital in the preamble, that the Act was passed to carry out an expressed wish of the legislatures of the different provinces of Canada, that they should be federally united, etc., with a Constitution similar in principle to that of the United Kingdom, would settle the question. I therefore think it clear that the intention was to have no reserved powers; that there should be in Canada the same kind of legislative power as there was in the British parliament, so far as that was consistent with the confederation of the provinces and our position as a dependency of the Empire."[1] And so likewise in the argument in Hodge *v.* The Queen, before the Privy Council,[2] Mr. Jeune, who was of counsel in the case, observed that he had always understood the preamble to the British North America Act, where it speaks of the Dominion having a Constitution similar in principle to that of the United Kingdom, as referring to this

But reserved to the people.

There are no such reserved powers under the British Constitution;

To which that of Canada is similar in principle.

[1] And so per Palmer, J., again, Ackman *v.* Town of Moncton, 24 N.B. at p. 114, (1884).

[2] Dom. Sess. Pap., 1884, Vol. 17, No. 30, at p. 62.

feature, that the Dominion has every legislative power not expressly given to the provinces.[1] And in one of the latest works on Canada,[2] we read :— "The Federalists of the United States, in breaking away from the sovereignty of England, were compelled to create, in some of its main aspects, an instrument of government deferring always to the will of the people, who were the depository of supreme power. In Canada, all power is supposed to descend down from the Crown."

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Mr. Greswell's History of Canada.

The second feature of the Constitution of the Dominion indicated in the leading Proposition, in respect to which it is often spoken of as contrasting with that of the United States, is that in the former all powers of legislation not expressly assigned to the provincial legislatures, are vested in the Dominion parliament, whereas, in the latter, as expressed in the tenth amendment to the Constitution of the United States,—which, in the words of Mr. Justice Story, "is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution"[3]:—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[4] This is again and again pointed out in the cases as a leading distinction between the two Constitutions.[5]

(2) In the United States the general residue of legislative power is with the States, in Canada with Parliament.

[1] And so per Henry, J., in Valin *v.* Langlois, 3 S.C.R. at p. 65, 1 Cart. at p. 201, (1879), notwithstanding the dicta of that learned judge, noted *supra* p. 313, n. 2.

[2] Greswell's History of Canada, p. 220, (Clarendon Press : 1890).

[3] Story on the Constitution of the United States, 5th ed., s. 1907.

[4] Referred to per Harrison, C.J., Leprohon *v.* City of Ottawa, 40 U.C.R. at p. 489, 1 Cart. at p. 646.

[5] Per Ritchie, C.J., Valin *v.* Langlois, 3 S.C.R. at p. 14, 1 Cart. at p. 171 ; per Fournier, J., S.C., 3 S.C.R. at p. 193, 1 Cart.

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Though Loranger, J., disputes this.

Nevertheless Mr. Justice Loranger, in his pamphlet so often already referred to, challenges its existence, and makes bold to say[1]:—"As a general rule, all powers belong to the provinces, and the powers of Parliament belong to it only as an exception; the powers of Parliament come from the provinces, which are the sources of all legislative authority in the Confederation, and the legislative power of Parliament is only a residue of the provincial legislative power. In this order of ideas, it should be said that all power, which is not federal, has remained provincial." But as has been already

at pp. 193-4; Slavin *v.* Village of Orillia, 36 U.C.R. at pp. 174-5, 1 Cart. at p. 701; per Ritchie, C.J., City of Fredericton *v.* The Queen, 3 S.C.R. at pp. 535-6, 2 Cart. at pp. 34-5; per Cross, J., North British and Mercantile, etc., Ins. Co. *v.* Lambe, M.L.R. 1 Q.B. at p. 152, 4 Cart. at p. 48; per Spragge, C., Leprohon *v.* City of Ottawa, 2 A.R. at p. 529, 1 Cart. at p. 600; per Taschereau, J., in Attorney-General of Quebec *v.* Attorney-General of the Dominion, 1 Q.L.R. at p. 181, 3 Cart. at p. 115, who goes so far as to say:—"With us the general government has all the rights, powers, and privileges, all the attributes of sovereignty which, by the British North America Act, have not been expressly reserved to the provincial governments," as to which, however, see *supra* p. 6, n. 1, and Propositions 7, 8, and 17, and the notes thereto, esp. at pp. 106-7. And see the speech of Attorney-General Macdonald in the Debates before Confederation, (Quebec, 1865), at pp. 33, 41. And by inference from the above distinction between the two Constitutions, it has been argued that there should be a difference in the rules for their interpretation. Thus in the argument *In re* Portage Extension of the Red River Valley R.W., Cass. Sup. Ct. Dig., p. 487, reported *in extenso* by Holland Bros., Senate Reporters, Ottawa, and printed by A. S. Woodburn, Ottawa, (1888), Mr. Edward Blake said:—"There, as your lordships know, the powers of Congress are strictly enumerated, while the States have the whole residuum, and there it has been laid down that the interpretation of State Constitutions is to be liberal, with presumptions in their favour, while the interpretation of the Constitution of the United States,—of the Congress,—is to be of the reverse order. It must be established, in the case of an Act of Congress, that the authority is within the power; it must be established in the case of an Act of a State that the authority is beyond its power; but that distinction, of course, is not applicable here, or, if applicable, it is applicable in a reverse sense, because the residuum of power is here given to the central instead of to the State authorities:" (p. 11).

[1] Letters upon the Interpretation of the Federal Constitution, p. 55: (Quebec, 1884).

indicated,[1] Mr. Loranger ignores the distinction between the nature and mode of origin of the Confederation of the various colonies in British North America into the Dominion of Canada, and the confederation of a number of independent countries, such as were the various States of the Union before they became the United States of America, and argues, in abstract fashion, that:— "It is of the essence of the federal system that the central government has only those powers which are conferred on it by the States, and the latter retain the remainder, for the very simple reason that the central government is the creation of the several governments that have given it the form and the totality of powers which they deemed suitable, and no more[2]; " and as to the word "merely" in number 16 of section 92,—"all matters of a merely local or private nature in the province,"—he takes it upon himself to pronounce it "void of meaning and altogether inapplicable."[3] Mr. Loranger's remarks, however, at least serve to call attention to the fact that though the Dominion parliament has the general residue of legislative power in Canada, the powers of the provinces are not all specified in the Act. They, too, have what may, perhaps, be termed a minor residuary gift of power to make laws in relation to "generally all matters of a merely local or private nature in the province."

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His position, however, is not sustainable,

Though provinces have a residuary gift of power in regard to merely local and private matters.

It is interesting to observe that in his Essay on the Government of Dependencies, published in

[1] See *supra* pp. 7-9, and the notes to Propositions 1 and 2 generally. At p. 15 will be found words of Peters, J., in Kelly *v.* Sulivan, 2 P.E.I. at pp. 91-2, (1875), indicating a view somewhat similar to that of Mr. Justice Loranger.

[2] *Ad loc cit.*, p. 46. See, also, *ib.* at p. 62; and *supra* pp. 316-7.

[3] *Ad loc. cit.*, pp. 57-8. As to the significance of "merely," see the notes to Proposition 33.

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Sir G. C. Lewis on the dangers of the American system;

1841, Sir George Cornewall Lewis says[1]:—"The limited extent of the powers given to the common government and the indefinite extent of the powers reserved by the several governments are certainly important defects in the political system of the United States, threatening to bring about a disruption or dissolution of their union, and involving the Federal State, which arises from their union, in wars or disputes with other independent communities. But the prejudices and interests which in each of the revolted colonies separated the powers of its peculiar government would have opposed invincible obstacles to a perfect fusion of those colonies into one independent State;" while in Angers *v.* The Queen Insurance Co.,[2] Torrance, J., observes:—"The framers of our Constitution had before them the melancholy warfare which had so long desolated so large a portion of this continent, and determined that there should be no question as to the supremacy of the general government or the subordinate position of our provinces. It was intended that the general legislature should be strong—far stronger than the Federal legislature of the United States in relation to the States Governments."[3]

Which that of Canada was intended to avoid.

Sir John Macdonald on the subject.

And in his recent judgment in *In re* Prohibitory Liquor Laws,[4] Gwynne, J., cites similar words from a speech of Sir John Macdonald in the Debates before Confederation[5]:—"I am strongly of the belief

[1] See ed. of 1891, by C. P. Lucas, at p. 321.

[2] 21 L.C.J. at p. 80, 1 Cart. at p. 155, (1877).

[3] But as to the term "subordinate" as applied to the position of the provinces, see *supra* pp. 106-7. Also Proposition 17 and the notes thereto, and *supra* p. 318, n. 2.

[4] 24 S.C.R. at p. 206, (1895).

[5] Debates before Confederation, (Quebec, 1865), pp. 32-3.

that we have in a great measure avoided in this system which we propose for the adoption of the people of Canada the defects which time and events have shown to exist in the American Constitution. . . We have strengthened the general government. We have given the general legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures shall be conferred upon the general government and legislature." Prop. 26

In Judge Gray's work on Confederation,[1] as quoted by the learned author himself in Tai Sing *v.* McGuire,[2] we find what may be thought, indeed, a somewhat fanciful explanation of the point of difference between the Constitutions of the Dominion and of the United States of which we have been speaking. He says:—"The source of power was exactly reversed. At the time of the framing of their Constitution, the United States were *congeries* of independent States which had been united for a temporary purpose, but which recognized no paramount or sovereign authority. The fountain of concession, therefore, flowed upwards from the several States to the united Government. The provinces, on the contrary, were not independent States. They still recognized a paramount or sovereign authority without whose consent or legislative sanction the union could not be formed. True, without their consent, the rights would not be taken from them; but, as they could not part with them to other Gray on Confederation.

[1] Toronto, 1872, Vol. 1, pp. 55-6.

[2] 1 B.C. (Irving) at p. 105, (1878).

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provinces without the Sovereign assent, the source from which those rights would pass to the other provinces, when surrendered to the Imperial government[1] for the purpose of confederation, would be through the supreme authority. Thus the fountain of concession would flow downwards, and the rights not conceded to the separate provinces would vest in the Federal government, to which they would be transferred by the paramount or sovereign authority."[2]

Implied powers of provincial legislatures.

In conclusion, when we speak of local legislatures having only such powers of legislation as are expressly conferred upon them by sections 92 and 93 of the British North America Act, it must not be forgotten that by virtue of the very fact that they are legislative bodies at all they may have certain implied powers and privileges necessarily incident to such bodies, and may be entitled to regulate by statute the exercise of such implied powers and privileges. This matter, however, will be found discussed in detail elsewhere.[3]

[1] As to this expression, cf. *supra* pp. 4-9.

[2] As to the history of the adoption by the framers of the scheme of Confederation of the plan whereby the federal legislature should have all legislative powers not specially conferred on the provinces, see Pope's Life of Sir J. Macdonald, Vol. 1, at p. 269; *ib.* App. vi., at p. 352; Pope's Confederation Documents, at pp. 27, 54, 84; also Quebec Resolution No. 29 (37), being No. 28 (36) of the Resolutions as adopted in London.

[3] See Proposition 66 and the notes thereto.

PROPOSITIONS 27 AND 28.

27. [With the exception of laws in relation to agriculture and immigration,] if the subject-matter of an Act is within the jurisdiction of the Dominion Parliament, it is not, [in its entirety], within the jurisdiction of the Provincial Legislatures, [whether acting severally or in concert with each other, though some of the provisions of such Act, ancillary to the main subject of legislation, may be within such Provincial jurisdiction]; and if the subject-matter of an Act is not within the jurisdiction of the Provincial Legislatures, [acting either severally or in concert with each other], it is within the jurisdiction of the Dominion Parliament.

28. With the exception of agriculture and immigration, there is no subject-matter over which there can, [speaking strictly, be said to] exist concurrent powers of legislation; and even then, should there be conflict, the authority of the Parliament of Canada is supreme, by

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The above Propositions are obviously so closely connected that they may well be treated of together. The first clause of Proposition 27, with the exception of the words in brackets, are taken from the judgment of the Privy Council in Valin *v.* Langlois[2]; while that "that which is excluded by the 91st section," (*sc.*, of the British North America Act), "is not anything else than matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces,"[3] is the basis upon which their lordships reasoned in that case, and is indeed involved in Proposition 26, the notes to which should be read in connection with the Propositions under consideration. Thus in Valin *v.* Langlois, holding that legislation in relation to Dominion controverted elections did not come within any of the classes of subjects enumerated in section 92, they held, as consequent therefrom, that the Dominion Controverted Elections Act, 1874, 37 Vict., c. 10,

Valin *v.* Langlois in the Privy Council.

The principle of the decision.

[1] While this portion of the present work is going through the press, judgments are pending in the appeals to the Privy Council in Huson *v.* The Township of South Norwich, 24 S.C.R. 145, and *In re* Prohibitory Liquor Laws, *ib.* 170. It may be anticipated that their lordships' judgments will have an important bearing upon the subjects here discussed, and the reader is requested to consult the table of Addenda, and also Appendix A.

[2] 5 App. Cas. at p. 119, 1 Cart. at p. 163, (1879). In Belanger *v.* Caron, 5 Q.L.R. at p. 27, (1879), Stuart, J., says :—"To assert an authority in the Dominion parliament to legislate on any subject is to deny any power in the provincial legislatures to legislate on the same subject; and it is equally true that any subject upon which the provincial legislatures can legislate, the Dominion parliament is disqualified from legislating upon it." The notes to these Propositions, however, will show that it is only in a very qualified sense that such language can be accepted.

[3] 5 App. Cas. at p. 119, 1 Cart. at p. 163.

was *intra vires*,[1] and that there was nothing to raise a doubt about the power of the Dominion parliament to impose, as in that Act, new duties upon the existing provincial Courts, or to give them new powers as to matters which did not come within the classes of subjects assigned exclusively to the legislatures of the provinces. And these dicta in Valin *v.* Langlois are referred to by Hagarty, C.J.O., in Clarkson *v.* The Ontario Bank,[2] where he says :— "It seems to me that if the Act before us be *intra vires* of Ontario, as not coming under the exclusive right of the Dominion, it must be held on the same chain of reasoning to be *ultra vires* the legislative power of the Dominion."[3]

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As applied by Hagarty, C.J.O.

There would certainly seem to be nothing in the two Propositions under discussion at variance with

Not at variance with L'Union St. Jacques *v.* Belisle.

[1]It had been previously so held in the Court of Review in Montreal in Ryan *v.* Devlin, 20 L.C.J. 77, (1875), and Owens *v.* Cushing, *ib.* at p. 86, (1875), and also in Dubuc *v.* Vallee, 5 Q.L.R. 34, (1879), where Caron, J., held that the Dominion Act in question had not, properly understood, added any new jurisdiction to the provincial Courts, but had constituted those Courts, or one of their judges, a federal Court for the administration of the Act, as it had a right to do under section 101 of the British North America Act. It had also been held *intra vires* in Ontario in the Niagara Election Case, 29 C.P. 261, (1878). On the other hand, in Belanger *v.* Caron, 5 Q.L.R. 19, (1879), Guay *v.* Blanchet, 5 Q.L.R. 43, (1879), and Deslauriers *v.* Larue, 5 Q.L.R. 191, (1879), cases in the Quebec Superior Court, the holding had been the other way. In Guay *v.* Blanchet, (at p. 51), Casault, J., observes, that if, in giving this jurisdiction to provincial Courts, Parliament could be said to have only created a federal Court for a federal object, it could give the jurisdiction to try all Dominion election petitions exclusively to one provincial Court, and direct it to sit for this purpose at Montreal or Toronto, Winnipeg or Victoria,— "for the creation or constitution of a Court includes its jurisdiction and the place where it shall sit, as well as its composition."

[2]15 O.A.R. at pp. 177, 181, 4 Cart. at pp. 511, 516, (1888).

[3]Cf. per Burton, J.A., in *Re* Grand Junction R.W. Co. *v.* The County of Peterborough, 6 O.A.R. at pp. 344-5, (1881). But as to the power of the Dominion parliament to embody like provisions to those of the Ontario Act in question in Clarkson *v.* The Ontario Bank, as ancillary to an Act in relation to Bankruptcy and Insolvency, see Attorney-General of Ontario *v.* Attorney-General of Canada, [1894] A.C. 189, and Proposition 37 and the notes thereto.

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the decision of the Privy Council in L'Union St. Jacques de Montreal *v.* Belisle.[1] The most that can be deduced from their lordships' judgment in that case is that the Dominion parliament might enact a general law which would embrace within its scope the subject-matter of the local law in question, not that it would have been competent for Parliament to enact the very law which they there held to be *intra vires* of the provincial legislature. And, indeed, as is expressed in Proposition 37, in assigning to the Dominion parliament legislative jurisdiction in reference to the general subjects of legislation specifically referred to in section 91, the Imperial Act by necessary implication intended to confer on it legislative power to interfere with matters otherwise assigned to provincial legislatures by section 92, so far as a general law relating to those subjects might affect them, and the notes to that Proposition may well be read in connection with what is here being discussed. In them will be found special reference to the recent decision of the Privy Council in reference to the Ontario Assignment for Creditors Act, Attorney-General of Ontario *v.* Attorney-General of Canada,[2] with respect to which, Taschereau, J., says in Huson *v.* The Township of South Norwich[3]: —"It results from that case, if I do not misunderstand it, that there are, under the British North America Act, subjects which may be dealt with by both legislative powers, and that the provincial field is not to be deemed limited by the possible range of unexercised power by the Dominion par-

In legislating under sect. 91, Parliament may incidentally intrude on the provincial area,

But the latter is not to be deemed limited by the unexercised power of Parliament.

[1] L.R. 6 P.C. 31, 1 Cart. 63, (1873). See Proposition 62 and the notes thereto.

[2] [1894] A.C. 189.

[3] 24 S.C.R. at pp. 155-6, (1895).

liament, so that a power conferred upon the latter, but not acted upon, may, in certain cases, be exercised by the provincial legislatures, if it fall within any of the classes of subjects enumerated in section 92 . . And where would the provinces be on this question of the liquor traffic if it were not so? At the mercy of the federal power, that is to say, at the mercy of each other . . That is surely not Canada's constitution. The inaction of the Dominion lawgiver cannot have such consequences. It cannot be that, simply because the Dominion authority will not prohibit all over the Dominion, the trade must be permitted everywhere in the provinces."

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Huson *v.* The Township of South Norwich.

And so in this same case of Huson *v.* The Township of South Norwich, Strong, C.J., with whom Fournier, J., concurred, says[1]:—"It appears to me that there are in the Dominion and the provinces respectively several and distinct powers authorizing each, within its own sphere, to enact the same legislation on this subject of prohibitory liquor laws restraining sale by retail; that is to say, the Dominion may, as has already been conclusively decided,[2] enact a prohibitory law for the whole Dominion, whilst the provincial legislatures may also enact similar laws, restricted, of course, to their own jurisdictions . . To neither of the legislatures is the subject of prohibitory liquor laws in terms assigned. Then what reason is there why a local legislature, in execution of the police power[3] con-

The power to pass prohibitory liquor laws.

[1] 24 S.C.R. at pp. 147-8, (1895).

[2] The reference is, of course, to Russell *v.* The Queen, 7 App. Cas. 829, 2 Cart. 12, (1882).

[3] As to police power in Canada, and that the provinces do not possess it exclusively in "the wide meaning which the jurisprudence of the United States has given to it," see per Sedgewick, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 248. See, also, p. 360, n. 2, *infra*.

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ferred by sub-section 8 of section 92, may not, so long as it does not come in conflict with the legislation of the Dominion, adopt any appropriate means of executing that power, merely because the same means may be adopted by the Dominion parliament under the authority of section 91 in executing a power specifically given to it? It has been decided by the highest authority that there are no reasons against such a construction;" and he, too, refers to Attorney-General of Ontario *v.* Attorney-General of Canada.[1]

The meaning of Proposition 27.

A doubt, however, may be felt as to the precise meaning of Proposition 27. It may be asked whether it means that if an Act is *intra vires* of the Dominion parliament, a precisely similar Act could not under any circumstances be *intra vires* of a provincial legislature? Now, remembering the rule expressed in Proposition 35, that subjects which in one aspect and for one purpose fall within section 92 may, in another aspect and for another purpose, fall within section 91 of the British North America Act; and also that expressed in Proposition 51, that if the subject-matter dealt with comes within the classes of subjects assigned to the parliament of Canada, there is no restriction upon its passing an Act which will affect one part of the Dominion and not another, it seems quite possible that a particular Act regarded from one aspect might be *intra vires* of the provincial legislature, and yet, regarded from another aspect, might be also *intra vires* of the Dominion parliament.[2] And such would seem to be the view of Wilson, J., in Regina *v.*

Can, in any case, identical legislation be *intra vires* both of Parliament and the legislatures?

Per Wilson, J., in Reg. *v.* Taylor.

[1][1894] A.C. 189. See *supra* p. 348, n. 1.

[2]See, also, Proposition 36 and the notes thereto. What is the "subject-matter" of an Act, in the full sense of Proposition 27, may depend upon what is the true aspect of the Act.

Taylor,[1] where he says of the Ontario Act, 33 Vict., c. 19, concerning bills of lading and giving consignees and endorsees the same rights, and imposing on them the same liabilities as if the contract had been made with them:—"I think that the same Act which the Ontario legislature passed as a general provision affecting property and civil rights over which it has exclusive jurisdiction, the Dominion parliament might also have passed as a necessary and convenient matter to be dealt with in the regulation of trade and commerce . . And the Ontario Act, just as it is, not professing to regulate trade, and not doing so but in an incidental manner only, is not, in my opinion, *ultra vires* so far as the statute itself can be, as I think in such a case it can be, supported as dealing only with property and civil rights." But whether or not there could be a case of an Act which in its entirety both Parliament and the provincial legislatures could constitutionally pass, enough has been stated to show that it must not be supposed to be impossible that Parliament and the provincial legislatures can for any purpose whatever, or under any circumstances whatever, legislate in relation to the same matter.[2]

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Legislation upon bills of lading

Might be either under property and civil rights, or the regulation of trade and commerce.

Certainly Parliament and the legislatures may sometimes legislate in relation to the same matter.

The leading Propositions under discussion, then, must be understood to mean that there is, strictly speaking, no concurrent jurisdiction between the Dominion parliament and the provincial legislatures over any subject-matter in its entirety, but not, as stated by Burton, J.A., in *In re* Local Option Act,[3] that "there is no such thing as overlapping contem-

There is not concurrent legislation over any subject-matter in its entirety.

[1] 36 U.C.R. at p. 206, (1875).

[2] And so per Meredith, C.J., in Blouin *v.* The Corporation of the City of Quebec, 7 Q.L.R. at p. 18, 2 Cart. at p. 373, (1880).

[3] 18 O.A.R. at p. 589, (1891).

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plated in the Act, nor any such principle as local legislation giving way to, or being overborne by, Dominion legislation, . . except in the two cases provided for in section 95[1];" words which may be well met by those of Rose, J., in Regina *v.* Stone.[2] There the Ontario Court of Common Pleas held *intra vires* a Dominion Act to provide against frauds in the supplying of milk to cheese factories, etc., which was very similar to the Ontario Act which had been held *intra vires* in Regina *v.* Wason,[3] and Rose, J., says (p. 49):—"It was urged upon us that if the legislature had power to deal with the subject, it followed that it was not within the jurisdiction of Parliament. I think this is not so. In my opinion, Mr. Edward Blake, in his argument in Regina *v.* Wason,[4] correctly stated the law as follows:—'The jurisdictions of the provinces and the Dominion overlap. The Dominion can declare anything a crime, but this only so as not to interfere with or exclude the powers of the province of dealing with the same thing in its civil aspect, and of imposing sanctions for the observance of the law; so that though the result might be an inconvenient exposure to a double liability, that possibility is no argument against the right to exercise the power."[5] The subject-matter of the two Acts here was not, strictly speaking, the same. That of the Dominion

But the powers of Parliament and the legislatures in some instances overlap.

[1]So, however, per Church, Q.C., *arguendo* before the Supreme Court of Canada in the matter of the Dominion Liquor License Acts, 1883-4: Dom Sess. Pap., 1885, No. 85, p. 107.

[2]23 O.R. 46, (1892).

[3]17 O.A.R. 221, 4 Cart. 578, (1890).

[4]Published *in extenso* by The Budget Printing and Publishing Co., Toronto, 1890.

[5]Cf. as to concurrent powers in reference to lotteries, Pigeon *v.* Mainville, 17 L.N. at p. 172.

Act was a crime,—it was a criminal law passed in the interests of the general public; that of the Ontario Act was rather the regulation of the mode of carrying on a particular trade or business within the province, so as to secure fair and honest dealing between the parties concerned. Prop. 27-8

Moreover, when the legislative powers of the Dominion parliament and the provincial legislatures respectively are said to be mutually exclusive, this must not be understood, as it would seem to have been by Taschereau and Gwynne, JJ., in Citizens Insurance Co. *v.* Parsons,[1] as meaning that legislation by the latter cannot be *intra vires* if it interferes with or even renders nugatory perfectly constitutional legislation by the former. The decision of the Privy Council in Bank of Toronto *v.* Lambe,[2] and other decisions cited in the notes to Propositions 48, 55, and 61, show that in certain cases local legislation may by indirect means render inoperative federal legislation, and *vice versa*. Moreover, legislation by one may interfere with legislation by the other.

The words of Proposition 28 are suggested by language of Fournier, J., in Severn *v.* The Queen[3]; Proposition 28.

[1] 4 S.C.R. at pp. 294, 329, 1 Cart. at pp. 317, 335, (1879).

[2] 12 App. Cas. at p. 586, 4 Cart. at pp. 21-2, (1887).

[3] 2 S.C.R. at p. 126, 1 Cart. at p. 470, (1878). So in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 220, (1895), Gwynne, J., says:—"There is no concurrent jurisdiction given to both,"(*sc.*, Parliament and the provincial legislatures), "save only over the three subjects specially designated as subject to concurrent jurisdiction;" and at p. 210, he refers to the words of Lord Carnarvon, on the second reading of the British North America Act in the House of Lords, (Hans., 3rd Ser., Vol. 185, at p. 566):—"There is, as I have said, a concurrent power of legislation to be exercised by the central and the local parliaments. It extends over three separate subjects,—immigration, agriculture, and public works." Later on, Lord Carnarvon adds:—"Public works fall into two classes: first, those which are purely local, such as roads and bridges and municipal buildings, and these belong not only as a matter of right, but also as a matter of duty to the local authorities. Secondly, there are public works which, though possibly situated in a single province, such as telegraphs, and canals, Concurrent powers of legislation.

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and in Hodge *v.* The Queen[1] Burton, J.A., uses almost identical words. And so per Henry, J., in City of Fredericton *v.* The Queen[2]:—"It has been legitimately contended, that in reference to all but one or two subjects the legislative powers of the parliament of Canada and local legislatures are not concurrent, but fully distributed, and in part enumerated."[3] Later on in the same case[4] the same learned judge observes:—"By the construction put by the Supreme Court of the United States upon its Constitution, concurrent jurisdiction has been found to exist in relation to several subjects; and legislation by the States has been decreed to be *intra vires* in many cases, until Congress legislated on the same

A point of contrast with the United States Constitution

and railways, are yet of common import and value to the entire Confederation, and over these it is clearly right that the central government should exercise a controlling authority." Public works are not mentioned in section 95 as among the subjects over which there are concurrent powers of legislation, but, doubtless, Lord Carnarvon and Gwynne, J., include them in the above passages because of the provision in section 92, No. 10, (*c*), of the British North America Act, whereby are excepted out of provincial jurisdiction such works, though local, as, "although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces." As to such declaration by the parliament of Canada, see the notes to Proposition 54.

[1] 7 O.A.R. at p. 274, 3 Cart. at p. 179, (1882).

[2] 3 S.C.R. at p. 544, 2 Cart. at p. 41, (1880).

[3] Cf. per Begbie, J., in the Thrasher Case, 1 B.C. (Irving) at p. 170, (1882); per Gray, J., S.C. *ib.*, at p. 230; per Fournier, J., in Severn *v.* The Queen, 2 S.C.R. at p. 119, 1 Cart. at p. 463, (1878), who says:—"The British North America Act contains in substance hardly anything more than the Quebec Resolutions, their object at that time being, most certainly, to constitute two distinct governments with different and exclusive powers." As a fact, however, such an intention is indicated much more clearly by the Act than by the Resolutions, in which exclusiveness of legislative power is explicitly mentioned only once, viz., in No. 29, (37), where the general Parliament, it is said, shall have power to make laws "generally respecting all matters of a general character, not specially and exclusively reserved for the local governments and legislatures." Cf. No. 28, (36), of the Resolutions as adopted in London: Pope's Life of Sir J. Macdonald, App. xiv., p. 381.

[4] 3 S.C.R. at p. 547, 2 Cart. at pp. 43-4.

subject.[1] The Imperial Act, however, provides against such intermediate legislation, and gives to Parliament and the local legislatures exclusive jurisdiction, not contingent upon previous legislation by either." Prop. 27-8

Now, the point of contrast between the Constitution of the United States and of the Dominion here referred to will be discussed in the notes to Proposition 61, *infra;* but it is submitted, and would appear from the authorities already cited, that it can by no means be said that the jurisdiction of provincial legislatures is never contingent upon previous legislation by the Dominion parliament.[2] In the recent argument before the Privy Council on December 12th, 1893, in Attorney-General of Ontario *v.* Attorney-General of Canada,[3] Lord Watson is reported to have spoken very instructively on this subject, as follows[4]:—"The view I have rather taken of it is this, that within the area given to the Dominion parliament by section 91 there is a legislative area part of which is their own exclusively, but that area may include, in addition, certain ancillary provisions which touch and trench upon the provincial law, and as long as there are enactments in that part of the area it would exclude the right of the province to legislate to the effect of destroying,—derogating from,—their enactment. It would take away their power as effectually as if it belonged to the primary area. If there had been

Dominion intrusions on provincial area.

Lord Watson.

[1]Burton, J.A., refers to this same feature of the Constitution of the United States in Leprohon *v.* City of Ottawa, 2 O.A.R. at p. 542, 1 Cart. at p. 615, (1878).

[2]See, also, Propositions 37, 46, and 62, and the notes thereto.

[3][1894] A.C. 189.

[4]The following extracts are taken from a transcript of the shorthand notes of the argument in the office of the Attorney-General at Toronto.

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no legislation, then my impression was that within what I call the secondary area, the provincial parliament was free to legislate." And when Sir R. Webster, *arguendo*, said:—"By the frame of section 91, you are to read out of section 92 anything which is enumerated in section 91," Lord Watson replied:—"That is rather suggesting this: the area of the legislative power is defined and capable of definition, and is absolutely exclusive in all cases. That is not the view which has been suggested by the decisions of this Board. The decisions of this Board rather point to this,—that there is a certain extent of that legislation which might be reserved to the province, but there are many ancillary regulations which might be made in carrying out their primary object, and the power given to them," (*sc.*, the Dominion parliament), "in which they can override the provincial authorities. But the provincial authority is there."[1]

Lord Watson.

Ancillary legislation.

Sir Horace Davey.

And there is also a passage from the very lucid argument of Sir Horace Davey before the Privy Council in Hodge *v.* The Queen,[2] which may well be noted in this connection. He says:—"It has been said in effect that the 91st and 92nd sections of the British North America Act (I do not know that the particular language has been used) are mutually exclusive. . . . My lords, that is true in one sense, and it is untrue in another. I

[1] This last extract seems somewhat confusedly reported, but the meaning evidently is that while there may be a portion of the legislative power assigned to the provinces, which the Dominion parliament could never properly assume to exercise as being ancillary to the exercise of the powers assigned to it by section 91, yet other portion it may so exercise. See the notes to Propositions 37 and 46; an article in 30 C.L.J., p. 182; and Todd's Parl. Gov. in Brit. Col., 2nd ed. at pp. 437-8. See, also, *supra* p. 308, n. 1.

[2] Reported Dom. Sess. Pap., 1884, Vol. 17, No. 30, at pp. 99-100.

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quite agree that an Act passed as 'The Temperance Act' was for the peace, order, and good government of Canada, in relation to matters not expressly mentioned in section 92 extending to the whole Dominion, would be, as it was held to be in Russell's case, 7 App. Cas. 829, within the competence of the legislature, but it does not by any means follow that an Act passed by the provincial legislature, local in its character and area, for a similar subject, would not be within the competence of the provincial legislature. It does not by any means follow, because if you consider the latter words of the 91st section, they are these:—'Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces,' that is to say, that the provincial legislature cannot legislate on a matter which is expressly mentioned in the enumeration in section 91 confining their legislation to the province,[1] and say that this is of a local or private nature; but where the Dominion legislation is not on any matter which is expressly mentioned in the enumeration of section 91, but is made under the general power to make laws for the peace, order, and good government of Canada, it does not by any means follow that the provincial legislature cannot make a local law of a similar character. . . To illustrate what I mean, the provincial legislature could not pass a local Act as regards beacons, buoys, and lighthouses, and say that it is merely of a local character. I suppose that would be so.

On the power to legislate for peace, order, and good government,

And on the concluding words of sect. 91.

[1] See Proposition 59 and the notes thereto.

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But it does not follow from that, that they might not pass—although the Dominion legislature might pass a general Act for the whole Dominion, dealing with the subject of temperance—that the local legislature therefore might not pass a local Act dealing to a certain extent with the same subject."[1]

In a partial sense, there is concurrent power between Parliament and the legislature in many cases.

These two passages further illustrate, as Propositions 37 and 62 above referred to clearly suggest, that in the partial sense indicated therein there is concurrent legislative power in Parliament and the provincial legislatures in many cases.[2]

And, in the same way, inasmuch as,—as expressed in Proposition 41,—with regard to certain classes of

[1]It should be carefully noted that in Russell *v.* The Queen, 7 App. Cas. 829, 2 Cart. 12, (1882), their lordships by no means say that a provincial legislature could not pass an Act for the province containing similar provisions to those of the prohibitory and penal parts of the Canada Temperance Act, 1878, in their application to localities adopting that Act in the prescribed manner. What their lordships there hold is (1) that the provincial legislatures could not even by concerted action have passed the Canada Temperance Act, the objects and scope of which were general, namely, to promote temperance by means of a uniform law throughout the Dominion; and (2) that the principle of local option embodied in that Act did not make it legislation upon a matter of a merely local nature. It will be remembered that the matters assigned to provincial legislatures by No. 16 of section 92 of the British North America Act are all matters of a "merely" local or private nature in the province. This word "merely" is not present in any of the other classes of subjects enumerated in that section. Hence there is nothing in the view above expounded by Sir H. Davey, or in the judgment in Russell *v.* The Queen, rightly regarded, at variance with the important rule embodied in Proposition 33, that the Federal parliament cannot extend its own jurisdiction by a territorial extension of its law and legislate on subjects constitutionally provincial by enacting them for the whole Dominion: see the notes to that Proposition. See, also, note 2, *infra*, and p. 348, n. 1, *supra*.

Russell *v.* The Queen.

[2]So per Taschereau, J., in Huson *v.* The Township of South Norwich, 24 S.C.R. at p. 160, (1895):—"There are a large number of subjects which are generally accepted as falling under the denomination of police regulations over which the provincial legislatures have control within their territorial limits, which yet may be legislated upon by the federal parliament for the Dominion at large. Take, for instance, the closing of stores and cessation of trade on Sundays. Parliament, I take it for granted, has the power to legislate on the subject for the Dominion; but, until it does so, the provinces have, each for itself, the same power." And as to police power, see *supra* p. 351, n. 3; and the argument in *In re* Dominion License Acts: Dom. Sess. Pap., 1885, at pp. 165 and 172, *et seq.*

subjects generally described in section 91 of the British North America Act legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces, there may be said to be concurrent jurisdiction as to such subjects in Parliament and the provincial legislatures in this sense, that legislative power as to a certain department, or certain departments of broad general subjects of legislation, is vested in the one, and as to the remaining departments in the other. Thus there would appear to be concurrent power of legislation in respect to the imposition of direct taxation in this sense, and in this sense only, that power to legislate in this way is in part vested in one and in part in the other. As stated by the Privy Council in Bank of Toronto *v.* Lambe[1]:—"As regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures;" while all other power to impose direct taxation is exclusively in the Dominion parliament under No. 3 of section 91, "the raising of money by any mode or system of taxation."[2]

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Sometimes, however, a broad general subject is apportioned between them.

Thus as to direct taxation.

[1] 12 App. Cas. at p. 585, 4 Cart. at p. 20, (1887).

[2] See per Taschereau, J., in Angers *v.* The Queen Insurance Co., 16 C.L.J.N.S. at pp. 204-5, 1 Cart. at pp. 149-50, and per Ritchie, C.J., in Severn *v.* The Queen, 2 S.C.R. at p. 101, 1 Cart. at p. 445, (1878), where taxation by means of licenses, as in No. 9 of section 92, is spoken of as being indirect taxation: as to this, however, see Queen *v.* McDougall, 22 N.S. 462, (1889); per Strong, J., Pigeon *v.* The Recorders Court and City of Montreal, 17 S.C.R. at pp. 503-4, 4 Cart. at pp. 447 8, (1890); per Osler, J.A., in Regina *v.* Halliday, 21 O.A.R. at p. 47, (1893); Lambe *v.* Fortier, 5 R.J.Q. 47, (1894); and Appendix A to this work. The above would also seem the explanation of the words of Cross, J., in Bank of Toronto *v.* Lambe, M.L.R. 1 Q.B. at p. 151, 4 Cart. at p. 47, (1885), when he says of the division of legislative powers under the British North America Act, that it "has been so contrived as to be in part exclusive to each, and in some particulars it must be conceded common to each." See, also, as to concurrent power of taxation, Todd's Parl. Gov. in Brit. Col., 2nd ed.

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The power to tax auctioneers.

So, again, as Strong, J., says in Severn *v.* The Queen[1]:—"The general legislature can undoubtedly tax auctioneers, and by express words the local legislatures have authority to do the same." In this sense there is concurrent jurisdiction to tax auctioneers. But the power to tax auctioneers by the exaction of a license "in order to the raising of a revenue for provincial, local, or municipal purposes" is, by No. 9 of section 92, in the local legislatures exclusively.

Judge Travis on this aspect of the Constitution

And Judge Travis, in his constitutional treatise already referred to,[2] puts this matter in a way worth noticing, thus[3]:—"The local legislatures have the right and power, in the first instance, (*i.e.*, before Parliament has effectually legislated so as to affect the particular subject-matter in section 92),[4] to legislate on all subjects-matter enumerated in the 92nd section, within these subjects-matter,—not farther on them within the subjects-matter enumerated in section 91. For example, the local legislatures can legislate on the solemnization of marriage, but no farther than that within the subject of marriage; on licenses, etc., under the 9th sub-section, but no farther than that, on that subject, within the subject of regulation of trade and commerce[5];" but he seems to grow care-

at p. 564; and the argument before the Supreme Court of Canada upon the Dominion Liquor License Acts, 1883-4: Dom. Sess. Pap., 1885, No. 85, at p. 98. See, too, per Dorion, C.J., in Dobie *v.* The Temporalities Board, 3 L.N. at p. 254, 1 Cart. at p. 389, (1880).

[1] 2 S.C.R. at p. 111, 1 Cart. at p. 455, (1878).

[2] See *supra* pp. 311, *et seq.*

[3] At p. 179.

[4] See *supra* p. 308, n. 1. And Proposition 37 and the notes thereto.

[5] As to the proper interpretation of the words "regulation of trade and commerce," however, see the notes to Proposition 49.

less, when he adds: —"On the subject of property and civil rights, but no farther than that to make it a legislation on trade and commerce,—on bankruptcy and insolvency,—or on any of the other subjects in section 91," for it would seem impossible to name a more comprehensive subject than property and civil rights, so that the correct mode of statement here would seem to be that Parliament may legislate on trade and commerce, bankruptcy and insolvency, etc., but not further than this on property and civil rights in the province.[1] Prop. 27-8

And lastly, in this connection, the words of Sedgewick, J., in *In re* Prohibitory Liquor Laws,[2] may be cited:—"When a general subject is assigned to one legislature, whether federal or provincial, and a particular subject, forming part or carved out of that general subject, is assigned to the other legislature, the exclusive right of legislation, in respect to the particular subject, is with the latter legislature. For example, Parliament has marriage, but the legislatures have the solemnization of marriage. On that subject they are paramount and supreme." But, he admits,[3] that the decision of the Privy Council in Russell *v.* The Queen[4] forbids the view "that the central Parliament could not, by virtue of any of its powers, destroy a special power given to the local legislatures for a special and particular purpose," and, therefore, as already explained, it is only in a very modified sense that the powers of the And so per Sedgewick, J.

[1] See *supra* p. 308, n. 1.

[2] 24 S.C.R. at p. 230, (1895).

[3] S.C. at pp. 240-1; see, also, S.C. at pp. 248-9.

[4] 7 App. Cas. 829, 2 Cart. 12, (1882).

Prop. 27-8 local legislatures, at any rate, can be said to be exclusive.[1]

The result of the authorities. It would seem, then, that the most that can be said with accuracy is that the powers of the Dominion parliament and of the local legislatures to deal directly and in their entirety, and as matter of separate and detached legislation, (as distinguished from legislative provisions merely ancillary to the main subject of legislation), with the various classes of subjects mentioned in sections 91 and 92, are in each case special and exclusive.

[1] As to whether provincial legislatures can intrude at all upon the Dominion area of legislative power, *quære*. See the notes to Proposition 37.

PROPOSITIONS 29, 30, AND 31.

29. There is no power given by the Confederation Act to the Dominion Parliament to amend or repeal an Act passed by a Provincial Legislature within the limits of its authority, nor to the Provincial Legislatures to amend or repeal a valid Dominion Act.

30. The powers conferred by section 129 of the British North America Act upon the Provincial Legislatures of Ontario and Quebec to repeal and alter the statutes of the old Parliament of the Province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of that Act; and the power of the Provincial Legislature to destroy a law of the old Province of Canada is measured by its capacity to reconstruct what it has destroyed.

31. In no case can an Act of the old Province of Canada, applicable to the two Provinces of Ontario and Quebec, be validly repealed by one of them, unless

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the nature of the Act is such that in the result it still remains in full vigour in the other.

Prop. 29.

The first clause of Proposition 29 is taken from the words of Dorion, C.J., in Dobie *v.* Temporalities Board,[1] and with the rest of the Proposition may perhaps be deemed almost too obvious to need enunciation. But it is important to remember that though the Dominion parliament has no power directly and *totidem verbis* to amend or repeal an Act passed by a provincial legislature within the limits of its authority, there are many cases where its legislation may have the effect of suspending the operation of valid provincial Acts, and of overriding them, as will appear from the notes to Propositions 27, 37, 46, and 62. And, on the other hand, it will be seen from Propositions 55 and 61, and the notes thereto, that provincial legislatures may limit the range which otherwise would be open to the Dominion parliament, or even render nugatory powers conferred by the latter.

Prop. 30.

The Privy Council.

As to Proposition 30, it is in the words of the Privy Council in Dobie *v.* The Temporalities Board.[2] The question there was as to the power the Quebec legislature had of altering and amending the Act of the province of Canada, 22 Vict., c. 66, incor-

[1] Doutre's Constitution of Canada at p. 261, 1 Cart. at p. 389, (1880).

[2] 7 App. Cas. at p. 147, 1 Cart. at p. 365, (1882). As to the exception made in section 129 of the British North America Act with respect to Imperial Acts, the author of an article on the Constitution of Canada in 11 C.L.T., at pp. 123-4, points out that it cannot be meant to indicate that no Imperial Acts whatever can be repealed, abolished, or altered in their operation within the Dominion, by either the Dominion parliament or the local legislatures,—as, for example, the Statute of Frauds. See as to this *supra* pp. 230-1. It must, therefore, refer only to those Imperial Acts which are intended to apply throughout the Empire, such as the Copyright laws, as to which see *supra* pp. 213-16 and 225-9.

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porating a Board for the management of the Temporalities Fund; and their lordships held that the Quebec legislature could not interfere directly, as they sought to do in the Act impeached, with the constitution and privileges of the corporation in question, which had its corporate existence and corporate rights in the province of Ontario, as well as in the province of Quebec. The professed object of the Act, they pointed out, and the effect of its provisions, was,—not to impose conditions on the dealings of the corporation with its funds within the province of Quebec,—but to destroy, in the first place, the old corporation and create a new one; and, in the second place, to alter materially the class of persons interested in the funds of the corporation. And, after observing that the power of the provincial legislature to destroy a law of the old province of Canada is measured by its capacity to reconstruct what it has destroyed, they say[1]:—"If the legislatures of Ontario and Quebec were allowed jointly to abolish the Board of 1858, which is one corporation in and for both provinces, they could only create in its room two corporations, one of which would exist in and for Ontario, and be a foreigner in Quebec, and the other of which would be foreign to Ontario, but a domestic institution in Quebec. Then the funds of the Ontario corporation could not be legitimately settled upon objects in the province of Quebec, and as little could the funds of the Quebec corporation be devoted to Ontario, whereas the Temporalities Fund falls to be applied either in the province of Quebec or in that of Ontario, and that in such amounts or proportions as the needs of the Presbyterian Church of Canada

Dobie *v.* The Temporalities Board.

Corporation created by Act of old province of Canada.

Power of provincial legislatures over same.

[1] 7 App. Cas. at p. 152, 1 Cart. at p. 371.

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in connection with the Church of Scotland, and of its ministers and congregations, may from time to time require. The parliament of Canada is, therefore, the only legislature having power to modify or repeal the provisions of the Act of 1858."[1]

Provincial legislatures cannot repeal where they cannot re-enact.

So Ramsay, J., in The Corporation of Three Rivers, *v.* Sulte,[2] says:—"I do not see how a legislature has power to repeal what it cannot re-enact," adding, however, "of course, it may sometimes indirectly do so, or do what will have a similar effect."[3] And in *In re* Squier,[4] accordingly, it was held by Wilson, C.J., and, in fact, admitted by counsel, that the Ontario legislature had no power, as they had assumed to do by 32 Vict., c. 26, O., to abolish the Court of Impeachment for the trial of charges against County Court judges for inability or misbehaviour in offices, established in Canada by 20 Vict., c. 58.[5]

The Temperance Act of 1864.

Again, when the Ontario legislature assumed to enact by 40 Vict., c. 18, that the sale of intoxicating liquors in localities in which the prohibitory clauses of the Temperance Act, 1864, 27-28 Vict., c. 18, of the late province of Canada had been brought into force, should also be a contravention of the Ontario Acts relating to selling

[1] As McCord, J., concisely expresses it in the Court below, S.C. 3 L.N. at p. 253, 1 Cart. at p. 385, the Board for the management of the Temporalities Fund created by 22 Vict., c. 66, C., being a corporation "created for the two provinces and applicable to them both, it can only be altered by a parliament having power to legislate for these two provinces."

[2] 5 L.N. at pp. 333-4, 2 Cart. at p. 286, (1882).

[3] See, also, Keefe *v.* McLennan, 2 R. & C. at p. 10, 2 Cart. at p 407, (1876).

[4] 46 U.C.R. 474, 1 Cart. 789, (1882).

[5] See *supra* p. 128, n. 1.

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without a license, which prescribed punishments, and proceedings other than those which had been prescribed by the Temperance Act, 1864, it was held by the Ontario Court of Queen's Bench in Regina *v.* Prittie,[1] and Regina *v.* Lake,[2] that such legislation was *ultra vires*, amounting as it did to direct legislation upon criminal law and criminal procedure, for the punishment of offences against the Temperance Act, 1864. And in like manner, in Hart *v.* Corporation of the County of Missisquoi,[3] and Cooey *v.* Municipality of County of Brome,[4] it was held that a provincial legislature cannot repeal or modify those sections of the Temperance Act of 1864 which conferred upon municipal councils the power to pass by-laws for prohibiting the sale of intoxicating liquors, upon the ground that the federal parliament had alone power to legislate on the subject of regulating and prohibiting the sale of such liquors.[5] In the latter case, Dunkin, J., observes[6]:—"As to all powers not of provincial competency, so to speak, which they," (*sc.*, municipalities), "may hold under antecedent delegation of the unlimited legislature of the late

Power of provincial legislatures to amend it,

Or alter municipal powers conferred by it.

[1] 42 U.C.R. 612, 2 Cart. 606, (1878).

[2] 43 U.C.R. 515, 2 Cart. 616, (1878).

[3] 3 Q.L.R. 170, 2 Cart. 382, (1876).

[4] 21 L.C.J. 182, 2 Cart. 385, (1872). Cf., also, Township of Compton *v.* Simoneau, 14 L.N. 347, (1891).

[5] Of course, so far as power to regulate is concerned, Hodge *v.* The Queen, 9 App. Cas. 117, 3 Cart. 144, (1883), and Corporation of Three Rivers *v.* Sulte, 5 L.N. 330, 2 Cart. 280, 11 S.C.R. 25, 4 Cart. 305, (1882-5), show that this ground is now untenable. See, too, Blouin *v.* Corporation of City of Quebec, 7 Q.L.R. 18, 2 Cart. 368, (1880). As to the power to prohibit, see Huson *v.* The Township of South Norwich, 24 S.C.R. 145, and *In re* Prohibitory Liquor Laws, 24 S.C.R. 170, (1895); and *supra* p. 348, n. 1. See, also, Appendix A to this work.

[6] 21 L.C.J. at p. 186, 2 Cart. at p. 388, (1877). See the notes to Proposition 45, *infra*.

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province of Canada, these can be rescinded or altered by Parliament alone."[1]

Sect. 129, B.N.A. Act.

It is, of course, plain, as Gwynne, J., points out in Sulte *v.* Corporation of Three Rivers,[2] that section 129 of the British North America Act only continues prior laws if there be no provision conflicting with them in other portions of that Act. But, on the other hand, Ferguson, J., holds in Regina *v.* Brierly,[3] that by "all laws in force" the section means "all laws that, in fact, existed in the respective countries mentioned, and then considered as valid and in force," whether actually valid or not.[4]

[1] In view of section 129 of the British North America Act, to which he does not refer, and of the above authorities, the decision of Johnson, J., in Ross *v.* Torrance, 2 L.N. 186, 2 Cart. 352, (1879), is unsustainable. A municipal corporation was authorized by an ante-Confederation Act to charge ten per cent. on overdue assessments. The legislature of Quebec passed an Act repealing this enactment and providing anew for a similar charge; and Johnson, J., held in the above case, that the ante-Confederation enactment was effectually repealed, although he at the same time held that the new provision was *ultra vires*. The same objection would apply to the view said to have been expressed by Caron, J., that if the Temperance Act, 1864, had been repealed by the local legislature, the local legislature nevertheless could not have re-enacted it: see per Ramsay, J., in Corporation of Three Rivers *v.* Sulte, 5 L.N. at pp. 333-4, 2 Cart. at p. 286, (1882). And on the subject generally of the power of the provincial legislatures to authorize municipalities to charge an additional percentage on overdue assessments, see Lynch *v.* Canada North-West Land Co., 19 S.C.R. 204, (1891), and *infra* pp. 388-90.

[2] 11 S.C.R. at p. 42, 4 Cart. at p. 322, (1885). Cf. Todd's Parl. Gov. in Brit. Col., 2nd ed., at p. 578.

[3] 14 O.R. at p. 544, 4 Cart. at p. 682, (1887). Boyd, C., does not seem to have shared this view: S.C., 14 O.R. at p. 336, 4 Cart. at p. 676.

[4] Other cases illustrating the operation of section 129 are Willett *v.* De Grosbois, 17 L.C.J. 293, 2 Cart. 332; Noel *v.* The Corporation of the County of Richmond, 1 Dor. Q.A. 333, 2 Cart. 246; Munn *v.* McCannell, 2 P.E.I. 148; Reed *v.* Mousseau, 8 S.C.R. 408. Mr. Clement (Canadian Constitution, at p. 535) observes that the whole body of laws,—common law as well as statutory enactments,—was continued by the section. As to powers existing under ante-Confederation charters, see Sandall *v.* Wilson, 31 N.B. 43, (1892); and Doutre's Constitution of Canada, at p. 143. The words of Patterson, J.A., in Reg. *v.* Eli, 13 O.A.R. at p. 528, remind us that an ante-Confederation Act, though not actually repealed, may have become effete by reason of subsequent legislation.

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As to Proposition 31, it is derived from the words of the Judicial Committee in Dobie *v.* The Temporalities Board[1]:—"In every case where an Act applicable to the two provinces of Quebec and Ontario can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other province."

[1] 7 App. Cas. at p. 150, 1 Cart. at p. 369, (1882). See this case further commented on in the notes to Proposition 68, *infra*.

PROPOSITIONS 32, 33, AND 34.

32. The Parliament of Canada cannot under colour of general legislation deal with what are provincial matters only; and, conversely, Provincial Legislatures cannot under the mere pretence of legislating upon one of the matters enumerated in section 92 really legislate upon a matter assigned to the jurisdiction of the Parliament of Canada.

33. The Federal Parliament cannot extend its own jurisdiction by the territorial extension of its laws, and legislate on subjects constitutionally provincial, by enacting them for the whole Dominion, as a Provincial Legislature cannot extend its jurisdiction over matters constitutionally federal, by a territorial limitation of its laws, and legislate on matters left to the Federal power by enacting them for one province only, as, for instance, incorporating a bank for a province.

34. If the Dominion Parliament, or the Provincial Legislatures, as the case may be, have no power to legislate directly

upon a given subject-matter, neither may they do so indirectly.[1] Prop. 32-4

The above Propositions may, perhaps, be correctly described, by way of distinction from the others formulated in this book, as having to do with deliberate attempts on the part of Dominion parliament, or provincial legislature, to trespass the one upon the other's area of legislative power. The first of them is concerned with colourable legislation —that is, legislation ostensibly under one or other of the powers conferred by the British North America Act on the enacting body, but, in truth and fact, relating to some subject which is not within the jurisdiction of that body. There appear to be few reported cases in which a Court has actually held an Act to be merely colourably constitutional in this sense, but Attorney-General for Quebec *v.* The Queen Insurance Co.[2] is such a case. There the Privy Council held that a certain Quebec Act, entitled "An Act to compel assurers to take out a license," and which purported to be, on the face of it, an exercise of the power conferred by No. 9 of section 92 of the British North America Act to make laws in relation to shop, saloon, tavern, auctioneer, and other licenses, was not, in substance, a license Act at all, but a simple Stamp Act on policies, and was indirect taxation, and *ultra vires*.

Prop. 32. Colourable legislation. Angers *v.* Queen Ins. Co.

As stated by Harrison, C.J., in Regina *v.* Lawrence[3]:—"It never could have been the design of the Imperial legislature, as manifested by the

Per Harrison, C.J., in Reg. *v.* Lawrence.

[1] See *supra* p. 348, n. 1.

[2] 3 App. Cas. 1090, 1 Cart. 117, (1878).

[3] 43 U.C.R. at pp. 174-5, 1 Cart. at pp. 744-5, (1878), cited per Graham, E.J., in Thomas *v.* Haliburton, 26 N.S. at p. 73, (1893).

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language which it has used in the British North America Act, to permit any legislative body, under pretence of exercising only its own exclusive legislative powers, to cover ground which, in truth, by the Constitution belongs to another."[1]

The Privy Council in Russell *v.* The Queen,

The Privy Council incidentally refer to the subject in Russell *v.* The Queen,[2] where they observe, referring to the Canada Temperance Act, 1878, then under discussion:—"There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local, or exists only in one province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only. It is, therefore, unnecessary to discuss the considerations which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion."

And in Colonial Building and Investment Association *v.* Attorney-General of Quebec.

And in much the same way in The Colonial Building and Investment Association *v.* The Attorney-General of Quebec,[3] where their lordships held that the mere fact that a Dominion company chose to limit its operations to one province only did not invalidate its charter,[4] they say:—"It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for

[1] There is, of course, nothing in this, or in the Propositions under discussion, inconsistent with Proposition 20, the purport of which is that we have no right to enquire what motive induced the legislature to exercise its powers, assuming that, apart from any question of ulterior motives, the legislation is *intra vires*. See at pp. 277-8, *supra*.

[2] 7 App. Cas. at pp. 841-2, 2 Cart. at pp. 25-6, (1882).

[3] 9 App. Cas. at p. 165, 3 Cart. at p. 128, (1883).

[4] See Proposition 57 and the notes thereto.

suggesting fraud in obtaining the Act," (*sc.*, of incorporation); the case here suggested apparently being one in which Parliament had been induced—while ostensibly exercising its proper power of incorporating Dominion companies[1]—to, in fact, incorporate a company with a provincial object, thus infringing upon the exclusive jurisdiction of the provinces under No. 11 of section 92 of the British North America Act.[2]

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No. 11, sect. 92, B.N.A. Act.

And it is to this passage in The Colonial Building and Investment Association *v.* The Attorney-General of Quebec that Ramsay, J., refers in Molson *v.* Lambe,[3] where, speaking of the wholesale liquor shop license exacted from brewers by the Quebec License Act, 1878, he says:—"If it can be defended at all, it is under sub-section 9 of section 92 of the British North America Act. It is an impost by way of license for the purpose of raising a revenue on what is admitted to be the ordinary trade of a brewer. This, I think, is constitutional, when it is fairly imposed; that is, when it appears that there

Per Ramsay, J., in Molson *v.* Lambe.

No. 9, sect. 92, B.N.A. Act.

[1] As to the Dominion powers in respect to the incorporation of companies, see Propositions 55, 56, and 57, and the notes thereto.

[2] In Citizens Insurance Co. *v.* Parsons, 4 S.C.R. at p. 310, 1 Cart. at p. 329, (1880), Taschereau, J., mentions the case of a Bill to incorporate the Christian Brothers as a Dominion body, which was referred to the Supreme Court of Canada by the Senate in 1876, and was reported *ultra vires* by them: (Journal of Senate, 1876, pp. 156, 206); and says:—"This bill purported to incorporate a company of teachers for the Dominion, and consequently as such infringed upon the powers of the provincial legislatures, in which is vested by section 93 of the British North America Act the exclusive control over education; and the learned judges, by declaring it unconstitutional, recognized the principle that, for a matter constitutionally provincial, the Federal parliament has not the power to incorporate a company for the Dominion. And that that is so seems to me clear." It may be added that their lordships' reasons in the matter are not given at length, but they expressly state their opinion to be that the bill is "a measure which falls within the class of subjects exclusively allotted to provincial legislatures under section 93 of the British North America Act:" Journal of Senate, 1876, Vol. 10, at pp. 206-7.

Dominion bill to incorporate the Christian Brothers.

Declared *ultra vires* by Supreme Court.

[3] M.L.R. 2 Q.B. at pp. 398-9, 4 Cart. at p. 364, (1886).

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is no fraudulent use of the British North America Act. If it appeared that the local Act was only nominally legislating for the purpose of raising a revenue, and that the statute was really contrived as a prohibitory measure, another consideration might, perhaps, come in. I only allude to this as a precaution, for there is no suggestion of any misuse of the legislative power, and I am not aware that the use of a legislative power to get round the constitutional Act has, as yet, been formally insisted upon as deciding as to the constitutionality of an Act, although it has been suggested that a case might occur in which that point would have to be considered. . . It seems, however, to be a necessary consequence of deciding, from the object of the law,[1] that the Courts must say whether the object is real or delusive."

Prohibiting under pretence of licensing.

Per Strong, J., in Severn *v.* The Queen.

In like manner, in Severn *v.* The Queen,[2] Strong, J., says:—"The imposition of licenses authorized by this sub-section 9 of section 92 is, it will be observed, confined to licenses for the purposes of revenue, and it is not to be assumed that the provincial legislatures will abuse the power, or exercise it in such a way as to destroy any trade or occupation. Should it appear explicitly on the face of any legislative Act that a license tax was imposed with such an object, it would not be a tax authorized by this section, and it might be liable to be pronounced *extra vires*."[3]

[1] See Proposition 36 and the notes thereto.

[2] 2 S.C.R. at pp. 108-9, 1 Cart. at pp. 452-3, (1878).

[3] And see to like effect as to a supposed merely colourable use of No. 9 of section 92, per Mackay, J., in *Ex parte* Leveillé, 2 Stev. Dig. at p. 447, 2 Cart. at p. 351, (1877); per Ramsay, J., in Angers *v.* Queen Insurance Co., 22 L.C.J. at p. 310, 1 Cart. at p. 135, (1878); per Harrison, C.J., in Regina *v.* Lawrence, 43 U.C.R. at pp. 174-5, 1

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No doubt, however, as Sedgewick, J., observes in *In re* Prohibitory Liquor Laws,[1] after expressing the view that the effect of No. 9 of section 92 of the British North America Act is practically to give the regulation of the liquor traffic to the legislatures :— "So long as such regulating legislation has, as its main object, the raising of revenue, it may contain all possible safeguards and restrictions as ancillary to the main object, the effect of which may be to repress drunkenness and promote peace, order, and good government generally."[2]

License Act may be so devised as to promote temperance.

Cart. at pp. 744-5, (1878) ; per Gwynne, J., in Sulte *v.* The Corporation of Three Rivers, 11 S.C.R. at p. 46, 4 Cart. at p. 325, (1885) ; per Weatherbe, J., in The Queen *v.* McKenzie, 23 N.S. at p. 11, (1890) ; per Sedgewick, J., *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 240, (1895); and Hodgins' Provincial Legislation, Vol. 1, at pp. 215-7, where we find an Ontario Act respecting license duties actually disallowed on the ground that it was not passed, as it professed to be, "with the single object of raising a revenue from licenses," but that "the real object aimed at " was, "if possible, to make the Dominion Liquor License Act, 1883, inoperative, by imposing a heavy and cumulative tax on persons taking out licenses under it," pending the determination of the question of its constitutional validity.

[1] 24 S.C.R. at p. 240, (1895).

[2] Sedgewick, J., specially refers several times in his judgment to the decision of the Privy Council in Russell *v.* The Queen, 7 App. Cas. 829, 2 Cart. 12, (1882), and therefore it is somewhat strange to find him following up his statement, above mentioned, that the effect of No. 9 of section 92 is practically to give the regulation of the liquor traffic to the legislatures, by saying (24 S.C.R. at p. 244) :— "I can only suggest that the limitation," (*sc.*, "in order to the raising of a revenue for provincial, local, or municipal purposes"), "was imposed for the very purpose of clearly limiting the provinces to regulation only." In Russell *v.* The Queen their lordships say expressly :— "It is to be observed that the power of granting licenses is not assigned to the provincial legislatures for the purpose of regulating trade, but in order to the raising of a revenue for provincial, local, or municipal purposes." With deference, it is submitted that the probable explanation of No. 9 of section 92 is that it was intended by it to authorize the provinces to raise a revenue by the licenses referred to, although some doubt might exist as to whether this was not indirect taxation. And so per Spragge, C.J., in Regina *v.* Frawley, 7 A.R. at p. 264, 2 Cart. at p. 581 ; per Maclaren, Q.C., *arguendo* in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 179 ; per Davey, Q.C., *arguendo* in the matter of the Dominion License Acts, 1883-4 : see the transcript from Marten and Meredith's shorthand notes, at pp. 126, 131. See also *supra* at p. 361, n. 2. As Sedgewick, J., points out, (24 S.C.R. at p. 244), the limitation in No. 9 of section 92, above referred to, "was an

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Pretended legislation on commerce.

To return, in Citizens Insurance Co. *v.* Parsons,[1] Fournier, J., says:—"The Federal parliament could not, under the pretence of legislating on commerce, entirely control a subject-matter which comes under the jurisdiction of the province;" while, conversely, in *In re* Slavin and The Village of Orillia,[2] Richards, C.J., refers to the words of McLean, J., in the License Cases,[3] that notwithstanding that the power of regulation of foreign commerce rests with Congress,

A parallel from the United States Constitution.

and not with the States; still, "if a foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it[4];" adding:—"Such a regulation must be made in good faith, and have for its sole object the preservation of the health and morals of society."

Per Harrison, C.J., in Reg. *v.* Lawrence.

In like manner, in Regina *v.* Lawrence,[5] Harrison, C.J., delivering the judgment of the Court of Queen's Bench for Ontario, observes:—"While two legislative bodies exist, each having distinct and exclusive legislative powers, there must be care exercised by each to avoid encroachment by either body upon the exclusive powers of the other, and this must be

addition made in London, with the assent of the colonial delegates there, just before the Act became law." See Pope's Life of Sir J. Macdonald, Vol. 1, App. xiv., at p. 383; Pope's Confederation Documents, at p. 106.

[1] 4 S.C.R. at p. 257, 1 Cart. at p. 303, (1880).

[2] 36 U.C.R. at p. 173, 1 Cart. at p. 700, (1875).

[3] 5 How. at p. 592.

[4] As to the power to prohibit the importation, manufacture, or sale of intoxicating liquors in Canada, see Huson *v.* The Township of South Norwich, 24 S.C.R. 145; *In re* Prohibitory Liquor Laws, *ibid.* 170; and Appendix A. See also *supra* p. 348, n. 1.

[5] 43 U.C.R. at pp. 174-5, 1 Cart. at pp. 744-5, (1878).

prevented by the Courts, whether the encroachment assume the guise of an honest neutral or the garb of an aggressive enemy. . . The whole domain of crime and criminal procedure is the exclusive property of the Dominion parliament, and to allow the parliament of a province to declare that an act which, by the general law, is a crime, triable and punishable as a crime, with the ordinary safeguards of the Constitution affecting procedure as to crime, shall be something other than, or less than, a crime, and so triable before and punishable by magistrates, as if not a crime, would be destructive of the checks provided by the general law for the constitutional liberty of the subject."[1] And the Court held that a provincial legislature could not, under pretence of legislating under No. 15 of section 92 to enforce a law as to shop, saloon, tavern, auctioneer, and other licenses, legislate with regard to acts which are criminal offences at common law, and wholly collateral to a prosecution for the violation of such a provincial liquor license Act.

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Provincial interference with criminal law,

Under pretended exercise of No. 15 of sect. 92 of B.N.A. Act.

And so, too, in Regina *v.* Wason,[2] Street, J., says:—"There are good reasons for holding that the provincial legislatures could not by the mere act of passing a statute forbidding the doing of something already an offence, and affecting property and civil rights in the province, confer upon themselves jurisdiction to inflict a new punishment for the offence, and justify it upon the ground that they were merely enforcing their own statute. The foundation for the jurisdiction claimed would be

So per Street, J., in Reg. *v.* Wason.

[1] See, likewise, per Harrison, C.J., in Regina *v.* Roddy, 41 U.C.R. at p. 297, 1 Cart. at p. 715, (1877).

[2] 17 O.R. at p. 63, 4 Cart. at p. 616, (1889). S.C. in App. 17 O.A.R. 221, 4 Cart. 578.

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defective, because of its dealing with matters of criminal law."[1]

But legislature may use cautionary phrases declaring no intention to transcend its powers.

It should not, however, apparently be deemed in any way necessarily a device to make unconstitutional legislation colourably valid, for a legislature to insert in its enactments such cautionary phrases as "in matters within the legislative jurisdiction of the province," "so far as this legislature has power thus to enact," "subject always to the royal prerogative, as heretofore," etc.; nor is the Court in such cases called upon by analysis or criticism of possible powers and functions, which may be embraced in the words used to discriminate as to what are within and what without the scope of the enactment; any particular case is to be dealt with as and when it arises. If no attempt has been made to act upon or enforce enactments thus guarded, it would seem premature to ask for a declaration of their invalidity. Such is the view of Boyd, C., in Attorney-General of Canada *v.* Attorney-

[1] Nevertheless, as this case of Regina *v.* Wason itself shows, the Dominion parliament and provincial legislatures may in many cases have the right to legislate, from different aspects, to prevent and punish similar acts. See Proposition 35 and the notes thereto, where Regina *v.* Wason is further referred to. See, also, *supra* pp. 51, n. 1, and p. 360, n. 2, and *infra* pp. 383-5. For further dicta as to the obligation of *bona fides* in the exercise of the legislative powers conferred by the British North America Act, and against legislation merely colourably within such powers, see per Ritchie, J., in Keefe *v.* McLennan, 2 R. & G. at pp. 11-12, 2 Cart. at p. 409, (1876); per Ritchie, J., in Murdoch *v.* Windsor and Annapolis R.W. Co., Russ. Eq. at p. 140, 3 Cart. at p. 371, (1877); per Spragge, C.J.O., in Peak *v.* Shields, 6 O.A.R. at p. 647, 3 Cart. at p. 276, (1881); per Taschereau, J., in Reed *v.* The Attorney-General of Quebec, 8 S.C.R. at p. 426, 3 Cart. at p. 205, (1883); per Gwynne, J., in Danaher *v.* Peters, 17 S.C.R. at p. 54, 4 Cart. at p. 436, (1889). And in this connection may be noted the dicta of Hagarty, C.J.O., in Clarkson *v.* The Ontario Bank, 15 O.A.R. at p. 181, 4 Cart. at p. 517, (1888), to the effect that a legislature cannot by piecemeal in separate Acts legislate in relation to matters which it could not deal with as a whole in one Act. The actual decision in this case was, of course, overruled by Attorney-General of Ontario *v.* Attorney-General of Canada, [1894] A.C. 189.

General of Ontario,[1] and in the same case in appeal, Burton, J.A.,[2] and Fournier, J.,[3] express their agreement. On the other hand, Gwynne, J., takes a different view, saying[4]:—"I think that the use of such a formula cannot divest the Court of power to pronounce an Act to be *ultra vires* if the subject-matter dealt with be not within the jurisdiction of the legislature to legislate upon; that is to say, if an Act of a provincial legislature deals in any way with such a subject-matter, the Act, not being *intra vires*, must be *ultra vires*. . . . The formula used does not divest the Act of its character of being an Act of the legislature, nor can it make the subject with which it proceeds to deal to be within the jurisdiction, if in point of law it is not." Prop. 32-4

Passing to Proposition 33 (which might indeed be deduced from Propositions 27 and 28), it is in the words of Taschereau, J., in Citizens Insurance Co. *v.* Parsons,[5] who adds in explanation:—"The British North America Act is not susceptible of a different construction without eliminating from section 91 thereof the controlling enactment that the general power of the central parliament to make laws for the peace, order, and good government of the whole Dominion, does not extend to the subjects left to the provincial legislative power, and that, notwithstanding anything in the Act, the authority of the central parliament over the matters enumer- Prop. 33. Per Taschereau, J., in Citizens Ins. Co. *v.* Parsons.

[1] 20 O.R. at p. 246, (1890).

[2] 19 O.A.R. at p. 38.

[3] 23 S.C.R. at p. 472, (1894).

[4] 23 S.C.R. at p. 475.

[5] 4 S.C.R. at p. 310, 1 Cart. at p. 329, (1880). And so per Gwynne, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 223, (1895).

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ated as left under its control is exclusive; as also without eliminating from section 92 of the Act the enactment that the provincial legislatures have exclusive power over the matters therein enumerated. And this cannot be done;" and the learned judge says that he presumes that it was upon this principle that the Bill to incorporate the Christian Brothers as a Dominion body was reported by the Supreme Court *ultra vires*, as above mentioned."[1]

Parliament and the legislatures have exclusive jurisdiction over subjects, not merely over area.

And similarly in *In re* Local Option Act,[2] Burton, J.A., says:—"I think the principle must be clear that neither the Dominion parliament nor the local legislature can attract to itself a jurisdiction in matters assigned exclusively to the other power by the mere device of enlarging the geographical area so as to include the whole of the provinces, nor in the other case of restricting the area in which the power is to be exercised."[3]

Sir Oliver Mowat.

As Sir Oliver Mowat, the Attorney-General for Ontario, expresses it in a report to the Executive Council of the province upon the decision of the Privy Council in Hodge *v.* The Queen[4]:—"It is clear that an alleged or supposed expediency of the law being uniform throughout the Dominion on any subject which is otherwise within the exclusive jurisdiction of the provincial legislatures does not

[1] See *supra* p. 375, n. 2.

[2] 18 O.A.R. at p. 589, (1891). And so, also, per Burton, J.A., in Regina *v.* The County of Wellington, 17 O.A.R. at pp. 433-4, (1890).

[3] "But this, of course, is not done where, in the execution of a power expressly given to it by section 91, the federal legislature makes laws similar to those which a provincial legislature may make in executing other powers expressly given to the provinces by section 92:" per Strong, C.J., in Huson *v.* The Township of South Norwich, 24 S.C.R. at p. 147, (1895). See, also, *supra* pp. 349-53, and Proposition 51 and the notes thereto.

[4] Dom. Sess. Pap., 1884, Vol. 17, No. 30, at p. 143.

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give jurisdiction to the Federal parliament to create uniformity."[1] Russell *v.* The Queen,[2] as has already been remarked,[3] does not decide anything adverse to this. On the contrary, as King, J., observes in *In re* Prohibitory Liquor Laws,[4] it was recognized in the decision of the Privy Council upon the Dominion License Acts, 1883-4, "where it was held that where a subject, such as the licensing system, is within a class of subjects assigned exclusively to the provinces, the Dominion does not, by legislative provisions respecting it, applicable to the entire Dominion, draw it at all within their proper sphere of legislation." As Mr. Edward Blake observed in his argument in Regina *v.* Wason,[5] we must recognize "as an inconvenience inseparable from the federal system a lack of power anywhere to make uniform regulations, co-extensive with the whole Dominion, on subjects relegated to provincial authority."

Russell *v.* The Queen decides nothing to the contrary.

Per King, J., in *In re* Prohibitory Liquor Laws.

The federal system has the defects of its qualities.

On the other hand, in the argument on the appeal to the Privy Council, now standing for judgment in *In re* Prohibitory Liquor Laws,[6] as reported in the *Times* newspaper, Lord Herschell is stated[7] to have

Argument on appeal to Privy Council in *In re* Prohibitory Liquor Laws.

[1] And so per Dorion, C.J., in Dobie *v.* The Temporalities Board, Doutre's Constitution of Canada, at pp. 263-4, 1 Cart. at p. 392.

[2] 7 App. 829, 2 Cart. 12, (1882).

[3] *Supra* p. 360, n. 1. And so per King, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 256, (1895).

[4] *Ib.* See further, as to the decision of the Privy Council in the matter of the Dominion License Acts, the notes to Proposition 35, *infra.* And for an abstract of the argument before them, see Todd's Parl. Gov. in Brit. Col., 2nd ed. at pp. 553-4. See, also, *supra* p. 58, n. 1.

[5] See this argument as published *in extenso* by The Budget Printing and Publishing Co., Toronto, at p. 6. See, also, *supra* p. 315, n. 3.

[6] See *supra* p. 348, n. 1.

[7] *Times* of August 2nd, 1895; *sub. nom.* Attorney-General for Ontario *v.* Attorney-General for the Dominion of Canada, and the Distillers and Brewers' Association of Ontario.

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observed, consistently with what has been already advanced,[1] that Russell *v.* The Queen did not settle the question whether the same matter as was dealt with by the Canada Temperance Act, then before the Board, could not be dealt with by the provinces locally in a manner not inconsistent with the Dominion legislation. And on Lord Davey saying it might be for "the peace, order, and good government" of the Dominion to prohibit, for instance, the sale of firearms, in any particular province, Lord Herschell, the report states,[2] said "it was difficult to see why a province might not itself deal with such a matter as a local subject. He did not suggest that the Dominion might not also deal with it as much more than a merely local matter. A sanitary regulation might be passed by a local legislature, but that would not prevent a general sanitary regulation of a similar nature, necessary for the safety of the whole Dominion, being enacted by Parliament." To hold otherwise would, it is submitted, be to ignore the significance of the word "merely" in No. 16 of section 92 of the British North America Act, which, it will be observed, does not occur in the descriptions of any of the other classes of subjects therein assigned to the provinces. Thus the meaning of No. 16 of section 92 would seem to be that, over and above the prior fifteen classes of subjects in that section named, and subject, of course, to the exclusive jurisdiction of the Dominion over the twenty-nine classes of subjects enumerated in section 91,[3] a provincial legislature may, also, legislate in a

Russell *v.* The Queen.

Lord Herschell.

"Merely" in No. 16, sect. 92, B.N.A. Act.

Its significance.

[1] See *supra* p. 360, n. 1.

[2] *Times* of August 7th, 1895. The transcript from Marten and Meredith's shorthand notes of the argument (first day, at p. 50; third day, at pp. 20-22) confirms the *Times*' report.

[3] See *supra* p. 308, n. 1.

merely local or private way in the province, on all other matters of a nature admitting of such mere local or private treatment, and may exclusively so legislate.[1] But inasmuch as the exclusive power of legislation thus given is over such matters *qua* their merely local or private nature, if they partake also of a general nature—or, in other words, if, in another aspect, they assume the form of matters affecting the peace, order, and good government of the whole Dominion,[2]—or, it may be, of more than one province,[3]—there is nothing in this to prevent Parliament legislating upon such matters in this latter aspect under its general powers conferred by section 91.[4] There is nothing in this inconsistent with the provision of section 91, that the general Dominion power of legislation does not extend to matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces, nor is there anything in it inconsistent with Proposition 33, now under discussion.

Subjects may, in one aspect, be local and private, in another general.

A contention has been advanced, and has met with the approval of one or two judges, in connection with the question of bankruptcy and insolvency,[5] that so long as the Dominion Parliament has passed no general law dealing with the subjects enumerated in section 91 of the British North America Act, the field is open to the provincial legislatures to supply the want of one so far as concerns their own provinces. But Osler, J.A., observes in Clarkson *v.*

Provinces cannot legislate on subjects in sect. 91 merely because there has been no Dominion legislation.

[1]As to the meaning of "of a merely local or private nature," see the notes to Proposition 59.

[2]See Proposition 35 and the notes thereto.

[3]See Proposition 51 and the notes thereto.

[4]See Proposition 26 and the notes thereto.

[5]See per Ritchie, C.J., in Armstrong *v.* McCutchin, 2 Pugs. at p. 384, 2 Cart. at p. 497, (1874); per Maclennan, J.A., *In re* Assignments and Preferences Act, 20 A.R. at p. 502. See, also, Clement's Canadian Constitution, pp. 216-7, 393.

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Ontario Bank,[1] that:—"Pushed to its legitimate conclusion, this argument implies that the legislature of each province may pass a local bankrupt or insolvent Act; but it is met and answered by the observation of the Privy Council in Lambe *v.* Bank of Toronto,[2] not, indeed, for the first time made there,[3] that the Federation Act exhausts the whole range of legislative power, and that what is not thereby given to the provincial legislatures rests with the Parliament."[4] It is submitted upon the authorities referred to in the notes to Proposition 59, (*q.v.*), that the express object of the concluding paragraph of section 91 was to guard against such a construction of the Act.

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Proceeding to Proposition 34, in Leprohon *v.* The City of Ottawa,[5] Spragge, C., says:—"I premise that the provincial legislature cannot do indirectly what it cannot do directly. If it cannot impose a direct tax upon public salaries, Dominion as well as provincial, it cannot empower municipalities to do so under the name of personal property or otherwise[6];" and in Gibson *v.* M'Donald,[7] O'Connor, J., uses similar words, holding *ultra vires* an Ontario Act which provided that the County Court

Legislatures cannot do indirectly what they cannot do directly.

[1] 15 O.A.R. at p. 191, 4 Cart. at p. 528, (1888).

[2] 12 App. Cas. at p. 588, 4 Cart. at pp. 23-4.

[3] See the notes to Propositions 26, 27, and 28.

[4] See, also, per Ritchie, C.J., in Quirt *v.* The Queen, 19 S.C.R. at p. 514; also an article in 30 C.L.J. 182.

[5] 2 O.A.R. at pp. 526-7, 1 Cart. at pp. 596-8, (1878).

[6] As to the decision in Leprohon *v.* City of Ottawa, see the notes to Proposition 61, *infra.*

[7] 7 O.R. at p. 419, 3 Cart. at p. 328, (1885). *In re* County Courts of British Columbia, 21 S.C.R. 446, (1892), would seem to overrule the decision of O'Connor, J., in this case. See the notes to Proposition 45.

judge of one county might preside at the sessions in a county other than that of which he was judge, on the ground that it amounted indirectly to the appointment of a County Court judge. Prop. 32-4

And in connection with this last case, Tarte *v.* Béïque[1] may be referred to, where Wurtele, J., lays it down that, since the provincial legislature has not power to provide for the appointment of the judges of Courts of superior or extended jurisdiction, it has no power either to confer the jurisdiction of a Superior Court, or the powers of a judge thereof, on any officer appointed by the provincial government, or on any other person to be named by it.[2] The appointment of judicial officers.

On this same principle, in Burk *v.* Tunstall,[3] Drake, J., held that though the provincial legislature could create Mining Courts, it could not give gold commissioners appointed to preside over them jurisdiction "unlimited as to amount, and limited only by the fact that the questions to be decided must be between persons engaged in mining." This, he said, was to trench upon the powers of the Governor-General under section 96 of the British North America Act. Otherwise "the provincial legislature would only have to constitute a Court by a special name to enable them to avoid this clause; but in the section itself, after the special Sect. 96, B.N.A. Act.

[1] M.L.R. 6 S.C.R. at p. 290, (1890).

[2] The actual decision of Wurtele, J., in this case was that a provision of a Quebec statute that the Lieutenant-Governor should have the same power to enforce the attendance of witnesses on commissions of enquiry issued by him in respect to any matters connected with the good government of the province, and to compel them to give evidence, "as is vested in any Court of law in civil cases," was *ultra vires*. On appeal, this was reversed; but, so far as appears from the report, the Court did not state its reasons: M.L.R. 6 Q.B. 263, *sub nom.* Turcotte *v.* Whelan.

[3] 2 B.C. (Hunter) 12, (1890). See also, as to this case, p. 127, *supra*.

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Courts therein named, the Courts of Probate in Nova Scotia and New Brunswick are excepted from the operation of the clause, thus showing that section 96 was intended to be general in its operation."[1]

Legislature cannot act in fraud of the Constitution.

Again, in Angers *v.* The Queen Insurance Co.,[2] Dorion, C.J., in the Quebec Court of Queen's Bench, observes, in reference to the provincial Act there in question, which he held imposed a tax which in reality, though not in form, was an indirect tax:—"It is an evasion of the Act from which the local legislature derives its powers. The local legislature, no more than private individuals, cannot act, as it were, in fraud of the law, to use a technical term; that is, to do by indirect means what it cannot effect directly."

"Interest" in No. 19 of sect. 91, B.N.A. Act.

So, too, in Ross *v.* Torrance,[3] Johnson, J., held that a provincial legislature has no power to authorize a municipal corporation to charge ten per cent. increase on overdue assessments, the so-called "increase" being but another name for interest, which, by No. 19 of section 91, is exclusively assigned to the Dominion, and he says[4]:—"They cannot change its nature by changing its name;" a

[1] Reference may also be made to a letter, signed George Patterson, in 21 C.L.J. at p. 421, in which the power of provincial legislatures to delegate the functions of judges appointed by the Governor-General under section 96 of the British North America Act to Masters and Referees appointed by the provincial government is discussed and disputed on the principle of Proposition 34. See, also, *supra* p. 164, n. 1; and *Re* The Dominion Provident Benevolent and Endowment Association, 25 O.R. 619, (1894); and upon the general subject of provincial attempts to evade section 96 in respect to the appointment of judges, see the report of Sir J. Thompson upon the Quebec District Magistrates Act, 1888, *supra* p. 141, *et seq.*

[2] 22 L.C.J. at p. 311, 1 Cart. at pp. 151-2, (1877). See, also, *supra* p. 373.

[3] 2 L.N. 186, 2 Cart. 352, (1879).

[4] 2 L.N. at p. 188, 2 Cart. at pp. 356-7.

holding which was followed in Schultz *v.* City of Winnipeg[1] in reference to a similar Manitoba enactment, as it was also in Morden *v.* South Dufferin.[2] However, these decisions were overruled by the Supreme Court of Canada in Lynch *v.* The Canada North-West Co.,[3] the Court holding, Gwynne, J., dissenting, that "interest" in No. 19 of section 91 means interest in connection with debts originating in contract, whereas taxes are not such debts.[4]

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Lynch *v.* Canada North-West Co.

[1] 6 M.R. at p. 40, (1884).

[2] 6 M.R. 515, (1890).

[3] 19 S.C.R. 204, (1891). See, especially, at pp. 213, 217, 223.

[4] In reference to this matter of "interest," attention may also be called to the footnote at p. 671 of Mr. Bourinot's Parliamentary Procedure and Practice, (2nd ed.), where he says:—"In 1886 a bill relating to interest on mortgages secured by real estate was withdrawn as *ultra vires*, the Minister of Justice having drawn attention to the fact that, among other objectionable features, one of the clauses contained a provision not relating to interest, properly speaking, but rather to contracts for the securing of money,—clearly a matter of provincial jurisdiction": Can. Hans., 1886, p. 440; Can. Com. Journ., 1886, p. 137. The bill here referred to was brought in to amend the Act 43 Vict., c. 42, D., s. 5, (now R.S.C., c. 127, s. 7), which provides that any mortgage may be discharged after five years, on a three months' bonus, though not in terms made payable till after that. It was this enactment as to which the Minister expressed the above view, and pointed out that the proposed amendment was open to the like objection. This seems to suggest the same distinction as that taken by Dubuc, J., in Schultz *v.* City of Winnipeg, 6 M.R. at p. 45, where he expresses the view that though by No. 19 of section 91 interest is exclusively within Dominion jurisdiction, this does not prevent a provincial legislature empowering municipalities to issue debentures bearing interest not exceeding seven per cent., or any other rate, for:—"In that case, it only authorizes the corporate body, as an artificial person, to contract for a rate of interest higher than the legal rate. The corporate body is not forced nor bound to pay such rate against its will. It is only allowed to contract for such a rate if it so desires." And Gwynne, J., speaks to like effect in Lynch *v.* The Canada North-West Co., 19 S.C.R. at p. 223. It may be further mentioned that though in Morden *v.* South Dufferin, 6 M.R. 515, the Manitoba Court of Queen's Bench held that to authorize the imposition of an increased percentage on assessments was *ultra vires*, they held that to authorize the allowance of a rebate on payment before a certain date was not, the distinction being, according to Killam, J., (at p. 519), that for an addition the authority of the legislature is necessary, but that in respect

"Interest" in No. 19 of sect. 91, B.N.A. Act.

Dominion Interest Act, R.S.C., c. 127.

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In the meanwhile, and before the Supreme Court decision, the Manitoba legislature passed an Act, (52 Vict., c. 45), the object of which was to override the decision of the provincial Courts, and which declared that the addition of the percentage on arrears of taxes was, and had been, lawful, but not so as to affect any pending suits, and provided that no sale for taxes theretofore or thereafter made should be impeached because such percentage formed part of the claim for arrears for which the lands had been sold, and that the Court of Queen's Bench for Manitoba should not have jurisdiction to impeach any such sale on any such ground. By his report, however, of March 1st, 1890, Sir John Thompson, as Minister of Justice,[1] recommended the disallowance of the Act, which was disallowed accordingly,[2] and his words bear upon the leading Proposition under discussion. He says:—"It may now be assumed, in consequence of the decision of the highest Court in Manitoba, that the imposition of the additional percentage referred to was *ultra vires* of the provincial legislature. If it be so, the subsequent enactment, which is now under review, is open to the same objection, and the legislature cannot make such legislation *intra vires* by prohibiting the Courts from deciding on the question."

Legislature cannot acquire power by fettering the action of the Courts.

Sir J. Thompson.

Somewhat analogous to this is the holding of Graham, E.J., in Thomas *v.* Haliburton,[3] that:—

of the discount there is a qualification of the provisions authorizing the imposition of a general rate, such that there is an absence of authority to charge more than the reduced amount before a certain date." In Lynch v. The Canada North-West Co., 19 S.C.R. at p. 224, however, Patterson, J., disputes the validity of this distinction, and, as we have seen, the Court held that even the authorization of the addition was *intra vires*.

[1] See *supra* p. 174, n. 1.

[2] By Order in Council of March 8th, 1890.

[3] 26 N.S. at p. 77, (1893).

"If the legislature could not pass a law to enable the House of Assembly to punish a man for contempt, or to punish a man for not submitting to its sentence in a criminal matter, I think it could not get round the difficulty by passing an indemnity Act, incorporating in the same Act a section indemnifying all of the members if he was so punished at their instance."[1] Prop. 32—Nor can they do so by passing indemnity Acts.

And the discussion of Proposition 34 may be concluded by mention of The European and North American R.W. Co. *v.* Thomas,[2] as suggesting the need of caution in applying the rule expressed in it. There a railway company had been incorporated by a New Brunswick Act, passed prior to Confederation, for the purpose of constructing a railway from St. John to the boundary of the United States, and its charter of incorporation was amended after Confederation by a further provincial Act, 32 Vict., c. 54, which, it was contended, was *ultra vires*, because the railway was a part of a scheme for a continuous railway extending through the province into the State of Maine. The Supreme Court of New Brunswick, however, held that it was *intra vires* under section 92, No. 10, of the British North America Act, Ritchie, C.J., observing[3]:—"We think we have no right to look to the intentions, or anticipations, or doings of parties outside the provincial legislature, either in the State of Maine or in the province of New Brunswick, and that the intention of the legislature, as expressed in the Act, alone The European and North American R.W. Co. *v.* Thomas. No. 10, sect. 92, B.N.A. Act. Provincial legislature may build railways to limit of province, though intended to connect with a foreign railway.

[1] This case has been carried to the Privy Council, and, at the time of this portion of this work going through the press, stands for judgment.

[2] 1 Pugs. 42, 2 Cart. 439, (1871).

[3] 1 Pugs. at pp. 45-6, 2 Cart. at p. 442. See, as to the power of provincial legislatures to authorize the construction of a railway to the boundary of the province, the letter of Mr. George Patterson, in 22 C.L.J. 307.

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can control us,—that the fact of the legislature of the State of Maine authorizing, or its people intending to construct, or actually constructing, a line of railway in that country, cannot in any way affect the authority of our own legislature to legislate on and deal with railway undertakings, provided always such railways do not connect the province with any other or others of the provinces, nor extend beyond the limits of the province. This is the simple question, and all we have to consider in determining on the validity of the Act."

PROPOSITION 35.

35. Subjects which in one aspect and for one purpose fall within the jurisdiction of the Provincial Legislatures may, in another aspect and for another purpose, fall within the jurisdiction of the Dominion Parliament.[1]

The above Proposition is derived from the words of the Judicial Committee in their judgment in Hodge *v.* The Queen,[2] where they say :—"The principle which the case of Russell *v.* The Queen,[3] and the case of the Citizens Insurance Company,[4] illustrate is that subjects which in one aspect and for one purpose fall within section 92 of the British North America Act may, in another aspect and for another purpose, fall within section 91."

The aspects of legislation may determine its constitutionality.

[1]The printing of this work, which, owing to practical necessities, has to be struck off in small sections, has been stayed, after completion of the notes to Proposition 34, for many months, pending the decision of the Privy Council upon appeal from the Supreme Court of Canada (24 S.C.R. 170) on the reference which it seems probable will be cited henceforth as The Liquor Prohibition Appeal, 1895. which has now (May 9th, 1896,) been given, and is reported 65 L.J. 26, *sub nom.* Attorney-General for Ontario *v.* Attorney-General for the Dominion of Canada and The Distillers and Brewers' Association of Ontario. It has, as was anticipated, a most important bearing, not only upon the subjects to be discussed under this Proposition, but upon many points subsequently to be treated of. Their lordships' decision will also necessarily govern the appeal from the decision of the Supreme Court in the case of Huson *v.* The Township of South Norwich, 24 S.C.R. 145, (1895). See p. 348, n. 1, *supra.*

[2]9 App. Cas. at p. 130, 3 Cart. at p. 160, (1883).

[3]7 App. Cas. 829, 2 Cart. 12, (1882).

[4]7 App. Cas. 96, 1 Cart. 265, (1881).

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Before, however, considering how these and other cases illustrate the principle thus expressed, it may be well at once to state that by "aspect" must be understood the aspect or point of view of the legislator in legislating,—the object, purpose, and scope of the legislation. The word may be said to be used subjectively of the legislator rather than objectively of the matter legislated upon.[1]

Meaning of "aspect."

And so in his lucid and instructive argument before the Privy Council in the above case of Hodge *v.* The Queen,[2] Mr. Horace Davey, as he then was, meeting the objection that to intrust the provincial legislature with the power of legislation on licenses was to interfere with trade and commerce, and that the Ontario Liquor License Act then before the Board was therefore *ultra vires*, says :—"It may incidentally, of course, affect the particular trade which is dealt with in the licensing law, but the principal object of the Act is not the interference with trade, nor is it aimed at the interference with trade, but is aimed at the regulation of trade carried on by particular persons, within a particular

Mr. Horace Davey.

[1]Gwynne, J., *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 219-21, would nevertheless seem to have understood "aspect" as meaning the aspect of the subject-matter legislated upon rather than, as, it is submitted, with deference, the authorities cited in the text abundantly show it should be understood, the aspect of the legislator. Thus he there speaks of the traffic in intoxicating liquor as having two aspects in which it may be regarded, one the aspect of prohibition, and the other the aspect of regulation. But traffic in intoxicating liquor does not in itself import legislation of any kind; prohibition of such traffic, however, does, and so does regulation of it. And whereas Gwynne, J., says that the right to absolutely prohibit the carrying on of the trade of selling spirituous liquors is a subject which does not admit of two aspects, the judgment of the Privy Council in that very case shows, as will presently appear, that this is not so; but, on the contrary, that it admits on the one hand of a local and private aspect in the province, and on the other hand of a Canadian or national aspect. King, J., S.C., at p. 257, seems to have understood the matter as explained in the text.

[2]Dom. Sess. Pap., 1884, Vol. 17, No. 30, p. 98.

area, for what may be shortly described as police purposes." And again in the same argument[1] he, in like manner, says :—"From one point of view I can understand that the regulation of liquor traffic may come under the head of trade and commerce, and would be within the competence of the Dominion parliament. Your lordships have so held; your lordships have held that the Temperance Act of 1878, which was before you in the case of Russell *v.* The Queen,[2] was within that competence . . . I can imagine on the other hand, and, in fact, my submission is, that police regulations with regard to the times of closing public houses with the object of preventing public houses becoming a resort for thieves and prostitutes, and other bad characters, and with regard to obtaining public quiet, and matters of that kind,—in that point of view the regulation of the liquor traffic, if I may use the expression, is a matter of a purely local character, and a fit matter for the provincial legislature to deal with . . . I am bound to admit that if you said it was either one or the other exclusively, either proposition would be wrong, because it may belong, with different aspects in different respects, to both or to either." And so, in Severn *v.* The Queen,[3] Ramsay, J., says :—"In a recent case the Privy Council has intimated that the object of the law might determine its constitutionality. In Russell *v.* The Queen, the object of

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Mr. Horace Davey on different aspects of legislation.

Ramsay, J., on same subject.

[1] *Ib.* at p. 93.

[2] 7 App. Cas. 829, 2 Cart. 12, (1882). But in their recent judgment on The Liquor Prohibition Appeal, 1895, their lordships clear up all doubt upon the point that it was under the general legislative power of Parliament to make laws for the peace, order, and good government of Canada, and not as coming within the regulation of trade and commerce that they held the Canada Temperance Act to be *intra vires* in Russell *v.* The Queen: 65 L.J. at pp. 33-4.

[3] M.L.R. 2 Q.B. at pp. 397-8, 4 Cart. at pp. 363-4.

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not within section 91.[1] Thus in words of Meredith, C.J., in Blouin *v.* The Corporation of the City of Quebec,[2] in which case the grounds of the decision of the Privy Council in Hodge *v.* The Queen were to a great extent anticipated by the Quebec Superior

[1]That is, they came within the three conjointly. See per Lord Herschell in the argument on The Liquor Prohibition Appeal, 1895, at p. 156 (published by Wm. Brown & Co., London, 1895). The interpretation which the Privy Council have given of No. 8 of section 92 of the British North America Act, "Municipal Institutions in the Province," in their recent decision on that appeal, 65 L.J. at p. 34, namely, that it "simply gives provincial legislatures the right to create a legal body for the management of municipal affairs," effectually disposes of the suggestion of Burton, J.A., *In re* Local Option Act, 18 O.A.R. at p. 587, *et seq.*, (1891), that if the attention of their lordships had been drawn, in Russell *v.* The Queen, to No. 8 of section 92 their decision would have been different, a suggestion somewhat discussed in the judgments in the Supreme Court, from which the appeal was taken to the Privy Council: see per Gwynne, J., 24 S.C.R. at pp. 223, 228; per King, J., S.C., at pp. 255-6; per Sedgewick, J., S.C., at p. 246. See also per Ritchie, C.J., on the argument before the Supreme Court in respect to the Dominion License Acts: Dom. Sess. Pap., 1885, No. 85, at p. 233. The perusal of the transcript from the shorthand notes of Marten & Meredith of the argument in Russell *v.* The Queen, which is in the possession of the Department of Justice at Ottawa, shows beyond a doubt that No. 8, though once or twice referred to, was not at all discussed or relied upon. What counsel for the appellant (Mr. Benjamin and Mr. Reginald Brown) relied upon in contending that the Act was *ultra vires* of the Dominion parliament was principally No. 9 of section 92. They also relied on Nos. 2, 13, and 16. The state of things existing in the municipalities before Confederation was only referred to to show that they always derived a revenue from liquor licenses (see second day at pp. 25-8), as regards which it was contended section 92 meant to give exclusive power to the provincial legislature. At the conclusion of the appellant's argument their lordships intimated to Mr. McLaren, counsel for the respondent, that they only wished to hear him on the subject of whether the Act was within No. 16 of section 92, "generally all matters of a merely local or private nature in the province." His argument, therefore, was confined to this point. But even if, as so many judges in Canadian courts have supposed (see *supra* at p. 47. *et seq.*), and counsel so often argued, municipal institutions in No. 8 of section 92 necessarily implied the right to endow these institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the time of Confederation, excepting, indeed, in respect to matters expressly given to the Dominion by section 91, it is submitted that the provisions of the Canada Temperance Act, 1878, as explained by the Privy Council, were quite beyond the scope of power over municipal institutions even as so understood.

Meaning of No. 8 of sect. 92, B.N.A. Act.

Municipal Institutions in the Province.

The argument in Russell *v.* The Queen.

[2]7 Q.L.R. at p. 22, 2 Cart. at p. 373, (1880).

Court, those people are mistaken who "seem to think it impossible that Parliament and the provincial legislatures can for any purpose whatever, or under any circumstances whatever, legislate in relation to the same matter."[1] Prop. 35

The cases, then, of Russell *v.* The Queen and Hodge *v.* The Queen illustrate the fact that there may be legislation in respect to traffic in liquors in two different aspects, one contemplating its prohibition in the general interests of the Dominion, and the other contemplating its regulation in the interests of the good order of the municipalities. But as to the prohibition of trade in intoxicating liquors, the recent decision of the Privy Council on The Liquor Prohibition Appeal, 1895,[2] shows that it also itself may be treated from two different aspects, under one of which it is within the exclusive jurisdiction of the Dominion parliament, while under the other it is within the exclusive jurisdic- Prohibitory liquor laws may differ in aspect.

[1] So Pomeroy on Constitutional Law, 1st ed., at p. 218, cited by Fournier, J., in Citizens Insurance Co. *v.* Parsons, 4 S.C.R. at p. 260, 1 Cart. at p. 306, (1880) :—"All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality." In Canadian Pacific R.W. Co. *v.* Northern Pacific R.W. Co., 5 M.R. at pp. 313-4, Killam, J., suggests that the Dominion parliament and local legislatures may both have certain powers of legislation as to the conditions under which provincial railways shall be allowed to cross Dominion railways. See, however, *In re* Canadian Pacific R.W. Co. and County of York, 32 C.L.J. 415,(1896). See, also, *supra* p. 352, *et seq.* And as to control of railway crossings see, further, Credit Valley R.W. Co. *v.* Great Western R.W. Co., 25 Gr. 507, 1 Cart. 822; *In re* Portage Extension of Red River Valley R.W., Cass. Sup. Ct. Dig. 487; and report of Minister of Justice of March 3rd, 1890, on Manitoba Act, 52 Vict., c. 19. As to the decisions in Russell *v.* The Queen and Hodge *v.* The Queen, see an article by "R." in 7 L.N. at p. 24; also, an article in 14 C.L.T. 323, entitled "The Privy Council Decisions," the criticisms in which, it is submitted, are completely answered in the text. Similar measures may flow from distinct powers. Railway crossings.

[2] 65 L.J. 26; *supra* p. 393, n. 1.

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not within section 91.[1] Thus in words of Meredith, C.J., in Blouin *v.* The Corporation of the City of Quebec,[2] in which case the grounds of the decision of the Privy Council in Hodge *v.* The Queen were to a great extent anticipated by the Quebec Superior

[1]That is, they came within the three conjointly. See per Lord Herschell in the argument on The Liquor Prohibition Appeal, 1895, at p. 156 (published by Wm. Brown & Co., London, 1895). The interpretation which the Privy Council have given of No. 8 of section 92 of the British North America Act, "Municipal Institutions in the Province," in their recent decision on that appeal, 65 L.J. at p. 34, namely, that it "simply gives provincial legislatures the right to create a legal body for the management of municipal affairs," effectually disposes of the suggestion of Burton, J.A., *In re* Local Option Act, 18 O.A.R. at p. 587, *et seq.*, (1891), that if the attention of their lordships had been drawn, in Russell *v.* The Queen, to No. 8 of section 92 their decision would have been different, a suggestion somewhat discussed in the judgments in the Supreme Court, from which the appeal was taken to the Privy Council: see per Gwynne, J., 24 S.C.R. at pp. 223, 228; per King, J., S.C., at pp. 255-6; per Sedgewick, J., S.C., at p. 246. See also per Ritchie, C.J., on the argument before the Supreme Court in respect to the Dominion License Acts: Dom. Sess. Pap., 1885, No. 85, at p. 233. The perusal of the transcript from the shorthand notes of Marten & Meredith of the argument in Russell *v.* The Queen, which is in the possession of the Department of Justice at Ottawa, shows beyond a doubt that No. 8, though once or twice referred to, was not at all discussed or relied upon. What counsel for the appellant (Mr. Benjamin and Mr. Reginald Brown) relied upon in contending that the Act was *ultra vires* of the Dominion parliament was principally No. 9 of section 92. They also relied on Nos. 2, 13, and 16. The state of things existing in the municipalities before Confederation was only referred to to show that they always derived a revenue from liquor licenses (see second day at pp. 25-8), as regards which it was contended section 92 meant to give exclusive power to the provincial legislature. At the conclusion of the appellant's argument their lordships intimated to Mr. McLaren, counsel for the respondent, that they only wished to hear him on the subject of whether the Act was within No. 16 of section 92, "generally all matters of a merely local or private nature in the province." His argument, therefore, was confined to this point. But even if, as so many judges in Canadian courts have supposed (see *supra* at p. 47. *et seq.*), and counsel so often argued, municipal institutions in No. 8 of section 92 necessarily implied the right to endow these institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the time of Confederation, excepting, indeed, in respect to matters expressly given to the Dominion by section 91, it is submitted that the provisions of the Canada Temperance Act, 1878, as explained by the Privy Council, were quite beyond the scope of power over municipal institutions even as so understood.

Meaning of No. 8 of sect. 92, B.N.A. Act.

Municipal Institutions in the Province.

The argument in Russell *v.* The Queen.

[2]7 Q.L.R. at p. 22, 2 Cart. at p. 373, (1880).

Court, those people are mistaken who "seem to think it impossible that Parliament and the provincial legislatures can for any purpose whatever, or under any circumstances whatever, legislate in relation to the same matter."[1] Prop. 35

The cases, then, of Russell *v.* The Queen and Hodge *v.* The Queen illustrate the fact that there may be legislation in respect to traffic in liquors in two different aspects, one contemplating its prohibition in the general interests of the Dominion, and the other contemplating its regulation in the interests of the good order of the municipalities. But as to the prohibition of trade in intoxicating liquors, the recent decision of the Privy Council on The Liquor Prohibition Appeal, 1895,[2] shows that it also itself may be treated from two different aspects, under one of which it is within the exclusive jurisdiction of the Dominion parliament, while under the other it is within the exclusive jurisdic- Prohibitory liquor laws may differ in aspect.

[1] So Pomeroy on Constitutional Law, 1st ed., at p. 218, cited by Fournier, J., in Citizens Insurance Co. *v.* Parsons, 4 S.C.R. at p. 260, 1 Cart. at p. 306, (1880) :—"All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality." In Canadian Pacific R.W. Co. *v.* Northern Pacific R.W. Co., 5 M.R. at pp. 313-4, Killam, J., suggests that the Dominion parliament and local legislatures may both have certain powers of legislation as to the conditions under which provincial railways shall be allowed to cross Dominion railways. See, however, *In re* Canadian Pacific R.W. Co. and County of York, 32 C.L.J. 415,(1896). See, also, *supra* p. 352, *et seq.* And as to control of railway crossings see, further, Credit Valley R.W. Co. *v.* Great Western R.W. Co., 25 Gr. 507, 1 Cart. 822; *In re* Portage Extension of Red River Valley R.W., Cass. Sup. Ct. Dig. 487; and report of Minister of Justice of March 3rd, 1890, on Manitoba Act, 52 Vict., c. 19. As to the decisions in Russell *v.* The Queen and Hodge *v.* The Queen, see an article by "R." in 7 L.N. at p. 24; also, an article in 14 C.L.T. 323, entitled "The Privy Council Decisions," the criticisms in which, it is submitted, are completely answered in the text. Similar measures may flow from distinct powers. Railway crossings.

[2] 65 L.J. 26; *supra* p. 393, n. 1.

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tion of the provincial legislatures.[1] Their lordships hold that :—"A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the province," and may perhaps be authorized under No. 13 of section 92, 'property and civil rights in the province'; but they do not con-

Local aspect of prohibitory liquor laws.

[1]Thus their lordships overrule the view of Gwynne, J., which he considers established by Russell *v.* The Queen, that "jurisdiction over the prohibition of the trade in intoxicating liquors, whether it be in the manufacture thereof, or the importation thereof, or the sale thereof, either by wholesale or retail, is not vested in the provincial legislatures, but is exclusively vested in the Dominion Parliament": *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 228; a view apparently shared by King, J., S.C., at pp. 258-9, and also expressed as to prohibition by several other judges in different cases, as, *e.g.*, by Weatherbe, J., in Queen *v.* McDougall, 22 N.S. at p. 481; per Townshend, J., S.C., at p. 490; per Ritchie, C.J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 542, 2 Cart. at pp. 39-40. In Queen *v.* McKenzie, 23 N.S. at pp. 16-17, (1890), and in Queen *v.* Ronan, 23 N.S. 421, (1891), at pp. 428, 439, Weatherbe, J., draws a most peculiar distinction, holding that the Dominion can alone pass temperance laws, or laws to promote abstemiousness or total abstinence, in the interest of morality and good order in the community, as distinguished from laws to repress drunkenness, for the preservation of law and order, which are exclusively for the provinces. But see per Graham, E.J., in the latter case at pp. 450, and 451-2, who observes :—"The Dominion Liquor License Act, 1883, can be as appropriately called a Temperance Act as the one in question," (the Nova Scotia Liquor License Act, 1886), "and yet the parliament of Canada had not power to pass it." Provincial legislatures may attain the end of preventing drunkenness in one way, while Parliament may attain it in another way. See per Meredith, C.J., in Blouin *v.* The Corporation of the City of Quebec, 7 Q.L.R. at p. 20, 2 Cart. at p. 371, (1880). However, in Huson *v.* The Township of South Norwich, 24 S.C.R. at pp. 147, 155, *et seq.*, Strong, C.J., and Taschereau, J., held, as the Privy Council now decide, that the Dominion and the provinces have several and distinct powers authorizing each within its own sphere to prohibit retail liquor sales. And in Corporation of Three Rivers *v.* Sulte, 5 L.N. at p. 334, 2 Cart. at p. 289, (1882), Ramsay, J., points out that Russell *v.* The Queen did not decide that the Dominion parliament can alone pass a prohibitory liquor law. As to wholesale as distinguished from retail selling, see Appendix A.

Prohibition is not exclusively a Dominion power.

sider it necessary to determine whether such legislation is authorized under that head or not, because, if not, it is certainly "not impossible that the vice of intemperance may prevail in particular localities within the province, to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor, a matter of a merely local or private nature, and therefore falling *primâ facie* within No. 16," (*sc.*, of section 92 of the British North America Act).[1] "In that state of things," they add, "it is conceded that the parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province, where prohibition was urgently needed."[2] But none the less, as decided in Russell *v.* The Queen, the Dominion parliament has power to legislate for the suppression of the liquor traffic in a Canadian aspect for the peace, order, and good government of Canada generally.[3]

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Local aspect of prohibitory liquor legislation.

[1]As to a similar provincial power to prohibit the manufacture of intoxicating liquors,—"if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province,"—see S.C., 65 L.J. at p. 38.

Provincial power to prohibit manufactures.

[2]And so in Huson *v.* The Township of South Norwich, 24 S.C.R. at p. 147, Strong, C.J., says:—"It is established by Russell *v.* The Queen, 7 App. Cas. 829, that the Dominion, being invested with authority by section 91 to make laws for the peace, order, and good government of Canada, may pass what are denominated local option laws. But, as I understand that decision, such Dominion laws must be general laws, not limited to any particular province." See, however, Proposition 51 and the notes thereto, where the comments of Lords Watson, Herschell, and Morris upon these words of Strong, C.J., made in the course of the argument on The Liquor Prohibition Appeal, 1895, (pp. 149-50), are referred to.

[3]In a striking passage in his judgment in Regina *v.* Harper, R.J.Q., 1 S.C. at pp. 333-5, (1892), in which he held that R.S.C., c. 159, being an Act respecting lotteries, betting, and pool selling, was *intra vires*, Dugas, J., seems to have anticipated the views of legislative jurisdiction in respect to power of prohibiting now expressed by the Privy Council in their recent judgment. The passage, however, should be read in connection with Proposition 66. He there says that the local legislatures "can pass laws to have effect within their respective

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Regulative liquor laws.

And it would seem in no way doubtful that the regulation of the liquor traffic also admits of two aspects in which it may be viewed and legislated upon. That it may be legislated upon in the provincial aspect, notwithstanding that by No. 2 of section 91 the regulation of trade and commerce is committed

territories only, upon matters of a purely local nature, some of which the federal parliament can generalize for the benefit of the Dominion at large." Prior to the late decision of the Privy Council, the question of the right to absolutely prohibit the wholesale trade in liquors seems to have come up for decision in one case only, viz., Lepine *v.* Laurent, 17 Q.L.R. 226, (1891), where Lynch, J., held that the provincial legislature could locally prohibit the sale either by wholesale or by retail. The cases in which the power to totally prohibit the sale by retail has come into question have not been very many. In Reg. *v.* Justices of Kings, 2 Pugs. 535, 2 Cart. 499, (1875); Hart *v.* The Corporation of the County of Missisquoi, 3 Q.L.R. 170, 2 Cart. 382, (1876); Cooey *v.* The Municipality of the County of Brome, 21 L.C.J. 182, 2 Cart. 385, (1877), reversed on appeal, but not on the constitutional point, see Lepine *v.* Laurent, 17 Q.L.R. at p. 229, 2 Cart. 391, n. 1; *Ex parte* Mansfield, 2 P. & B. 56, (1878); De St. Aubyn *v.* Lafranc, 8 Q.L.R. 190, 2 Cart. 392, (1882); and *Ex parte* Foley, 29 N.B. 113, (1889), and per Gwynne, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 214, *et seq.*, it was held that the provincial legislatures had no such powers, because it would infringe upon the exclusive power of the Dominion parliament to regulate trade and commerce, a view which the Privy Council in their late judgment, 65 L.J. at pp. 33-4, have clearly overruled, holding, moreover, that the prohibitive enactments of the Canada Temperance Acts, 1886, cannot be regarded as regulations of trade and commerce. See Proposition 49, and the notes thereto. Another ground of objection to the possession of such power by the provinces has been that it would be an interference with the Dominion control of inland revenue and excise: Reg. v. Justices of Kings, *supra;* per Ritchie, C.J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 542, 2 Cart. at pp. 39-40; per Cameron, J., in Reg. *v.* Howard, 45 U.C.R. at p. 349; per King, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 259. The same point was argued before the Privy Council on the late Liquor Prohibition Appeal, 1895, (see the argument as published by Wm. Brown & Co., London, 1895, at pp. 126, 151-5, 175, 182, 276); but, as has been seen, was ineffectual, which might indeed have been anticipated from the principle laid down in Bank of Toronto *v.* Lambe, 12 App. Cas. 575, 4 Cart. 7. See Proposition 61, and the notes thereto. On the other hand, the power of the provincial legislatures to prohibit sale by retail was upheld in *In re* Local Option Act, 18 O.A.R. 572, (1891), as within No. 8 of section 92, as to which see note 2, *supra* p. 398, and in Village of Huntingdon *v.* Moir, M.L.R. 7 Q.B. 281, (1891). See, also, per Ritchie, E.J., in Keefe *v.* McLennan, 2 R. & C. at pp. 12-3, 2 Cart. at pp. 410-11; per Ramsay, J., in The Corporation of Three Rivers *v.* Sulte, 5 L.N. at pp. 332-3, 2 Cart. at pp. 283-4; per Wilson, J., in Reg. *v.* Taylor, 36 U.C.R. at p. 213.

Past decisions on power to pass prohibitory liquor laws.

Grounds upon which they proceeded.

exclusively to the Dominion parliament, is of course established by the case of Hodge *v.* The Queen, already sufficiently referred to; and the decision of the Privy Council in the matter of the Dominion License Acts, although no reasons were there given, evidently proceeded upon the ground that Parliament was therein legislating upon the subject not in a Dominion aspect, but in a provincial aspect, and that the Acts were therefore *ultra vires*. A perusal of Martin & Meredith's shorthand notes of the argument, which are in print, leads to the conclusion that in their decision the Board accepted the contention of Mr. Davey that the Acts were *ultra vires* because they were for the purpose of regulating the liquor traffic through the machinery of local municipal licensing bodies, exercising restricted local jurisdiction, and exercising police functions within those local jurisdictions, and amounted also to a taxation of the inhabitants within the respective provinces for municipal purposes, because the balance of the license fund under them, after payment of the inspectors' salaries and the expenses of the commissioners, was to go into the municipal treasury, the regulation and the legislation with reference to wholesale licenses being the same as that with reference to shop licenses.[1] That this was the ground on which their lordships proceeded is clearly indicated by the interjectional remarks of members of the Board during the course of the argument. Thus (at p. 27) Sir Barnes Peacock says :—" In the County of Chicoutimi, and so on in Quebec, there

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May also have different aspects.

In re Dominion License Acts 1883-4.

Grounds of Privy Council decision.

[1] As to the distinction between wholesale trade and retail trade, so far as legislative power over them is concerned, see Appendix A. And for useful summaries of the provisions of the Dominion License Acts, 1883-4, see the report of the argument and proceedings on the same reference before the Supreme Court of Canada : Dom. Sess. Pap., 1885, No. 85, at pp. 22, 104-5.

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are powers given which are different from other localities, which tend to show that these are matters of a local nature which must be regulated according to the locality." And (at p. 43) Sir Montague Smith, contrasting the Dominion License Act, 1883, (the principal Act before the Board), with the Canada Temperance Act, decided in Russell *v.* The Queen[1] to be *intra vires* of the Dominion parliament, says :—" The difference seems to be that this is a sort of regulating Act rather than a prohibitory Act " ; and (at p. 64) :—" The question is whether this is not, whatever terms it may use in the preamble, really regulating in each province the local traffic." Lord Fitzgerald (at p. 66) observes :—" If this Act of 1883 is, as a whole, within the powers of the Dominion parliament, it supersedes the whole of the Ontario Act which we were dealing with in Hodge *v.* The Queen." And (at p. 87) Sir Montague Smith again says :—"The question may be,—granted that the Temperance Act might override by prohibiting the traffic altogether,—whether when licenses are to be granted and persons regulated in a police way that is not a local matter"; and (at p. 98) :—" They think you have regulated minutely in a sort of local way a retail trade."[2]

In re Dominion License Acts 1883-4.

Grounds of Privy Council decision.

[1] 7 App. Cas. 829, 2 Cart. 12, (1882).

[2] In the argument, however, which took place on December 12th, 1893, before the Judicial Committee in Attorney-General of Ontario *v.* Attorney-General of Canada, [1894] A.C. 189, in respect to the Ontario Assignment for Creditors Act, as reported by Marten & Meredith, when reference was made to the Dominion License Acts case by counsel, who observed that the only key to their lordships' reasons was in the report of the argument, the Lord Chancellor, who, as Sir Farrer Herschell, had been of counsel for the Dominion in that case, said :—" I have been through it again, and I fail to find the key there." However, Lord Watson, in the same argument, referring also apparently to the Dominion License Acts case, seems to confirm the conclusion arrived at in the text by saying :—" The judgment in that case seems rather to suggest that whilst the Dominion might determine certain conditions which were attached to the liquor trade in the Dominion, it was for each province to determine whether it should be

It may further be observed, in elucidation of their lordships' decision in the above matter, that under the Dominion License Act, 1883, sections 8 and 9, each board of license commissioners of the

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sold at all in certain localities, and, if so, at what hours and under what conditions in the interests of the police and the morality of the place." And in the argument in the recent Liquor Prohibition Appeal, 1895, before their lordships (see page 393, n. 1, *supra*), as reported in Marten & Meredith's notes of the first day's argument, at p. 109, (see page 402, n. 1, *supra*), Lord Davey says, referring to the Dominion License Acts matter :—"I think what was intended was this,—that the machinery of the Act was local in its character, that is to say, it created local boards with the power to make local by-laws. I think that was what was intended." And so also in the same argument (third day, at pp. 319-20) Mr. Edward Blake, who was of counsel in the case, says of their lordships' decision :—"It seems plain from the decision in that case, and from the general tone of the discussion, that it was held that the Dominion could not generalize in a matter which was purely local—purely local as had been decided by Hodge *v.* The Queen; that their attempt to deal with that subject, to appropriate it to themselves, it being a local subject, by acting for the whole Dominion, and appointing their own officers, and so forth, did not alter the character of the matter, or deprive the province of that power which they had under 'merely local or private'; that it remained a local or private subject, and, therefore, the Dominion License Act was void, while the local license Act was maintained." And in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 249, Sedgewick, J., seems to take a similar view to that in the text of the grounds on which the Judicial Committee proceeded in this matter of the Dominion License Acts; though he maintains that the sole power to regulate the liquor traffic is in the provinces. And so also per King, J., S.C. at pp. 256-7. In like manner, the report of the argument before the Supreme Court of Canada on the same reference clearly indicates that the objections to the Acts in the view of the judges was what is above stated: Dom. Sess. Pap., 1885, No. 85, see esp. per Strong, J., at p. 122; see also per Davie, *arguendo*, *ib.* at p. 153. For a synopsis of the argument before the Privy Council, see Todd's Parl. Gov. in Brit. Col., 2nd ed. at p. 551, *et seq.* For other judicial comments upon the decision of the Privy Council in *In re* Dominion License Acts, see per McDonald, C.J., in Queen *v.* McDougall, 22 N.S. at pp. 472-3, 476; per Weatherbe, J., S.C., at p. 477; per Ritchie, J., S.C., at p. 485; per Townshend, J., S.C., at pp. 495-7; per Osler, J.A., in Reg. *v.* Halliday, 21 O.A.R. at p. 48; per Palmer, J., in *Ex parte* Donaher, 27 N.B. at p. 90. It may be added that after delivery of the judgment in the Privy Council in the case of Hodge *v* The Queen, (9 App. Cas. 117, 3 Cart. 144), the Lieutenant-Governor of Ontario forwarded a despatch to the Secretary of State at Ottawa, requesting that in view of it the Dominion Liquor License Act, 1883, should be repealed by the Federal parliament, and enclosing a report of Mr. Mowat, the provincial Attorney-General, upon the effect of the decision as showing that the Act ought to be repealed: Dom. Sess. Pap., 1884, No. 30, pp. 141-4.

In re Dominion License Acts 1883-4.

Grounds of Privy Council decision.

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different districts respectively might make their own regulations. On the other hand, in Russell *v.* The Queen,[1] the Privy Council especially insist upon the element of uniformity in the Canada Temperance Act in holding it to be *intra vires*, saying: — "The objects and scope of the legislation are general, viz., to promote temperance by means of a uniform law throughout the Dominion. The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and Parliament alone can so deal with it."

Russell *v.* The Queen.

But although it may be correct to say with Gwynne, J., in Molson *v.* Lambe,[2] that the judgments of the Privy Council, in Russell *v.* The Queen,[3] Hodge *v.* The Queen,[4] and in the Matter of the Dominion License Acts,[5] all "rest upon the foundation that laws which make, or which empower municipal institutions to make, regulations for granting licenses for the sale of intoxicating liquors in taverns, shops, etc., and for the good government of the taverns and shops so licensed, and for the peace and public decency in the municipalities, and for the repression of drunkenness and disorderly and riotous conduct, and imposing penalties for the infraction of such regulations, are laws which, as dealing with subjects of a purely local, municipal, pri-

The local aspect of regulative liquor laws.

[1] 7 App. Cas. at p. 841, 2 Cart. at p. 25.

[2] 15 S.C.R. at p. 287, 4 Cart. at pp. 347-8, (1888).

[3] 7 App. Cas. 829, 2 Cart. 12.

[4] 9 App. Cas. 117, 3 Cart. 144.

[5] 4 Cart. 342, n. 2; Cas. Dig. S.C. 509. See p. 290, n. 1.

vate, and domestic character, are *intra vires* of the provincial legislature"; nevertheless the liquor trade is as much part of the trade and commerce of the country as any other trade, and therefore it must be within the power of the Dominion parliament to regulate it in any manner and in any degree which comes within the meaning of No. 2 of section 91 of the British North America Act,—"The regulation of trade and commerce";[1] and notwithstanding some *dicta* to the contrary,[2] it seems equally clear that the Dominion parliament in so regulating might do so by means of licenses. Indeed, as Hagarty, C.J.O., observes, in *In re* Local Option Act,[3] the Canada Temperance Act, 1878, which the Privy Council held to be *intra vires* of the Dominion parliament in Russell *v.* The Queen, itself contemplated the issuing of licenses to brewers and distillers and manufacturers of native wines. And so in the course of the argument before the Judicial Committee in the matter of the Dominion License Acts[4] Sir Barnes Peacock observes :—"You could not say that the Parliament could not create a criminal offence for selling liquors without a license in the same way as they might create a similar offence for carrying arms without a license,

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Such legislation may have a Dominion aspect.

Dominion licensing laws.

[1] As to which see Proposition 49 and the notes thereto. And apart from its powers under No. 2 of section 91, the Dominion parliament has, no doubt, certain powers of regulating the trade under its general residuary legislative power for the peace, order, and good government of Canada, but this would not enable it to encroach upon the provincial powers of regulation. See Propositions 26 and 32-4, and the notes thereto, esp. at p. 381, *et seq.*, and the recent decision of the Privy Council in The Liquor Prohibition Appeal, 1895, 65 L.J. at p. 32.

[2] As per Fournier, J., in Molson *v.* Lambe, 15 S.C.R. at p. 265, 4 Cart. at p. 343. And see, also, per Ritchie, C.J., S.C., 15 S.C.R. at p. 259, 4 Cart. at p. 339; and per Cartwright, Q.C., *arguendo* in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 188.

[3] 18 O.A.R. at p. 580, (1891).

[4] At p. 140.

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or manufacturing dynamite without a license."[1] The fact of an Act imposing the necessity of taking out a license before dealing with intoxicating liquors is not the crucial point to be considered in determining whether such Act is or is not within the exclusive power of the provincial legislatures, but whether the Act so requiring a license does or does not come within one of the classes of subjects enumerated in section 92. "Constitutional limitations," says Palmer, J., in *Ex parte* Donaher, "look only to results, and not to the means by which results are reached."[2]

Licensing laws.

To return to our leading Proposition, in their recent judgment on the subject of prohibitory liquor

[1]And as to both the Dominion parliament and the provincial legislatures having power to tax by means of license, see per Ritchie, C.J., in Severn *v.* The Queen, 2 S.C.R. at p. 101, 1 Cart. at p. 445, (1878); and per Taschereau, J., in Angers *v.* The Queen Insurance Co., 16 C.L.J., N.S., at pp. 204-5, 1 Cart. at pp. 149-50. In Raynor *v.* Archibald, 31 C.L.J. 669, (1895), McDougall, Co.J., expresses the view, though not necessary to the decision of the case, that though the provincial legislature may regulate the selling of liquor by persons holding licenses, and can prohibit such persons giving liquor to a minor, its power does not extend to making it an offence for a person not a licensee, or employee of such licensee, to give any person liquor, whether such other person be an adult or a minor, apparently deeming that this would be an infringement on the Dominion power over criminal law.

Taxation by license.

[2]27 N.B. at p. 590, (1888). Story on the Constitution of the United States (5th ed., vol. 2, at p. 14) says:—"The acknowledged powers of the States over certain subjects having a connection with commerce are entirely distinct in their nature from that to regulate commerce; and, though the same means may be resorted to, for the purpose of carrying each of these powers into effect, this by no just reasoning furnishes any ground to assert that they are identical. Among these are inspection laws, health laws, laws regulating turnpikes, roads, and ferries, all of which, when exercised by a State, are legitimate, arising from the general powers belonging to it, unless so far as they conflict with the powers delegated to Congress. They are not so much regulations of commerce as of police." See, also, *ib.*, Vol. 1, at p. 342. "The line between interference with commerce and regulation of police is said to be a very dim and shadowy one": per Wilson, J., in Regina *v.* Taylor, 36 U.C.R. at p. 211, quoting from Cooley on Constitutional Limitations, 2nd ed., p. 586.

An American parallel.

legislation,[1] the Privy Council call attention to the interesting circumstance, that matters which at one time may only admit of being treated in a local or provincial aspect may at another time assume a phase in which they may admit also of being treated in a Dominion or national aspect. They say at the place referred to :—"Their lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian parliament in passing laws for their regulation or abolition, in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and, therefore, within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern in such sense as to bring it within the jurisdiction of the parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province, would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which their lordships conceive might be competently dealt with by the parliament of the Dominion." One may compare with this the case put by Sir Farrer Herschell, then of counsel for the Dominion, (but who also sat as a member of the Board on the recent case above referred to), in the matter of the Dominion License Acts[2] :—"Take the very case which I put—power

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Subjects of legislation, once only local, may assume a Dominion aspect.

Traffic in firearms.

[1] 65 L.J. at p. 33. See *supra* p. 393, n. 1.

[2] At p. 62.

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given by the province to a municipality to require licenses to be taken out by any one for the storing of gunpowder. Suppose such a power conferred on the municipality, and that that was a matter which would be within their competence—would that take away or would that be inconsistent with the power of the Dominion parliament to pass an Act applying throughout the whole of the Dominion, for the public safety, prohibiting altogether the sale of any explosive, or subjecting it to much more stringent regulations? Then you come to a matter which is not merely municipal, because you are dealing with it from another aspect, as is put in this very case—that which from one aspect might be within section 92 is from another aspect within section 91. You must look at the scope and object, and if you have legislation for a general purpose, which is applicable to and decided to be necessary for the good of the whole country, then to that is subordinated any local legislation merely of a local character."[1]

Traffic in explosives.

Other cases illustrating different aspects of laws.

The various decisions, therefore, which have arisen in connection with laws prohibiting or regulating the liquor traffic illustrate in a remarkable way our leading Proposition. It remains, however, to notice certain other cases which also illustrate it. As we have seen,[2] the Privy Council, in Hodge *v.* The Queen,[3] referred to the case of Citizens Insurance Co. *v.* Parsons,[4] as illustrating the principle. What their lordships doubtless mean is that the purport of their judgment in that case was that the true aspect of the Ontario License Act which they there held *intra vires* was that of an Act intended to

[1] See Proposition 46 and the notes thereto.

[2] *Supra* p. 393.

[3] 9 App. Cas. at p. 130, 3 Cart. at p. 160, (1883).

[4] 7 App. Cas. 96, 2 Cart. 265, (1881).

regulate the business of fire insurance companies in the province of Ontario, with a view to securing uniform conditions in their policies, and not that of an Act for the general regulation of trade in the Dominion; and that for this reason it fell within No. 13 of section 92 of the British North America Act, "property and civil rights in the province," and not within No. 2 of section 91, "the regulation of trade and commerce."[1]

Citizens Insurance Co. *v.* Parsons.

A recent writer in the *Canadian Law Times*[2] well observes that legislative dealings with an insolvent estate also exemplify the rule expressed in the leading Proposition. Thus he says:—"The Dominion may pass an insolvent law, and as incident thereto—or for the purpose of making it effectual, in the aspect of dealing with insolvency—may incidentally pass laws affecting procedure, etc. But the province may, in dealing with property and civil rights and civil procedure, pass laws respecting them which do not lose their efficacy because the person affected may happen to be insolvent. That is to say, for different purposes or by different approaches each may deal with the property and civil rights of an insolvent." This is, of course, illustrated by the judgment of the Privy Council in connection with the Ontario Act respecting assignments for the benefit of creditors, Attorney-General

Bankruptcy and insolvency legislation.

[1] In their recent judgment upon The Liquor Prohibition Appeal, 1895, (65 L.J. at p. 33), their lordships say:—"The scope and effect of No. 2 of section 91 were discussed by this Board at some length in Citizens Insurance Co. *v.* Parsons, 7 App. Cas. 96, where it was decided that in the absence of legislation upon the subject by the Canadian parliament the legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade." As to the meaning of the words, "in the absence of legislation upon the subject by the Canadian parliament," see Proposition 46 and the notes thereto.

[2] 14 C.L.T. at pp. 324-5.

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of Ontario *v.* Attorney-General of Canada[1]; and in Parent *v.* Trudel,[2] Andrews, J., says in connection with the same subject :—" Notwithstanding the concluding paragraph of section 91 of the British North America Act, insolvency of debtors seems to be one of such subjects," (*sc.*, such as illustrate the rule in our leading Proposition), " and though a general bankruptcy and insolvency Act such as that, for instance, recently in force here, under the title of the Insolvency Act of 1875, is admittedly a matter to be dealt with by the Federal parliament, it seems to me that a law defining the conditions under which a writ of *capias* can be obtained (even though it apply in some of its enactments merely to insolvent traders) is within the power of our local legislature to deal with."

Bankruptcy and insolvency legislation.

And in Pillow *v.* City of Montreal,[3] Cross, J., suggests what would be another application of the same principle. There the question was whether an Act of the legislature of Quebec, prohibiting the use of factory chimneys " sending forth smoke in such quantities as to be a nuisance," was *ultra vires*, and the Court of Queen's Bench at Montreal held that it was not, for that the offence aimed at, though designated a nuisance, fell short of the criminal misdemeanour of common nuisance, and the Act concerned police regulation incidental to municipal institutions. But at the place referred to Cross, J., observed :—" Perhaps the question could be met in a broader sense, that is, admitting that the act of permitting or causing a chimney to send forth smoke in such

Legislation against nuisances.

[1][1894] A.C. 189; see, also, per King, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 257, (1895), and Proposition 37 and the notes thereto.

[2]13 Q.L.R. at p. 139.

[3]M.L.R. 1 Q.B. at p. 409, (1885).

quantity as to be a nuisance amounts to the misdemeanour which is a common nuisance by the criminal law of the land, would the provincial legislature be prohibited from taking measures, not to try whether a common nuisance had been committed for which the offender would be amenable by criminal prosecution, but, when a certain state of facts occurred which might or might not amount to such common nuisance, would that legislature not be entitled, always acting within their powers, to provide that such penalties would be a consequence of that state of facts? . . It is unnecessary to rule this point for the decision of the present case. . . I may, however, remark that the case is fairly put by Judge Torrance in the case of *Ex parte* Pillow,[1] where he holds that the power of the Dominion parliament to enact a general law of nuisance, as incident to its right to legislate as to public wrongs, is not incompatible with a right in the provincial legislature to authorize a municipal corporation to pass a by-law against nuisances hurtful to public health, as incidental to municipal institutions."

Legislation against nuisances may be in different aspects.

And so Osler, J.A., observes in Regina *v.* Wason[2]:—"The legislature, when really dealing with property and civil rights, must have power to say 'thou shalt' or 'thou shalt not,' and as the breach of the legislative command is always, in one sense, an offence, the line between what may and what may not be lawfully prescribed without trenching upon criminal law is sometimes difficult to ascertain, and may shift according to circumstances. As has more than once been remarked, in one way

Provincial offences and criminal law.

[1] 6 L.N. 209, (1883).

[2] 17 O.A.R. at pp. 240-1, 4 Cart. at p. 599, (1890).

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of dealing with a particular subject it may be within section 91, or in another way or for another purpose it may fall within section 92," citing Citizens Insurance Company *v.* Parsons,[1] and Hodge *v.* The Queen.[2] And in like manner, in the same case, Maclennan, J.A., says[3] :—" What was here enacted, although it may in its widest sense be regarded as a criminal law, falls under section 92 as a legitimate dealing with property and civil rights in the province." And it is instructive to find that the Dominion parliament having passed an Act (52 Vict., c. 43) very similar to the provincial Act in question in Regina *v.* Wason, to provide against frauds in the supplying of milk to cheese factories, etc., it, too, was held to be *intra vires* in Regina *v.* Stone,[4] as a public criminal law passed in the interest of the general public, while, as Rose, J., says in that case (p. 48), the holding in Regina *v.* Wason was that the Act of the legislature " merely protected private rights."[5]

Frauds upon cheese factories.

[1] 7 App. Cas. 96, 1 Cart. 265.

[2] 9 App. Cas. 117, 3 Cart. 144.

[3] 17 O.A.R. at p. 251, 4 Cart. at p. 611.

[4] 23 O.R. 46, (1892). See, also, Regina *v.* Keefe, 1 N.W.T. (No. 2) 86, (1890); and p. 51, n. 1, *supra*.

Provincial legislation against malicious injury to property.

[5] Cf. per Scott, J., in Regina *v.* Fleming, 15 C.L.T. at p. 247. In connection also with the above cases and the kind of legislation they deal with, the Quebec Provincial Act, 38 Vict., c. 81, may be referred to, which authorized certain persons to erect piers and booths in the river Nicolet, and by s. 6 provided that any person wilfully or maliciously cutting, breaking, or destroying any part of such piers or booths should be liable to be prosecuted for all damages so done, and on conviction be liable for all costs and damages, and, in default of payment or giving sufficient security, to imprisonment according to the decision of the Court before which the suit shall have been brought. In McCaffrey *v.* Hall, 35 L.C.J. 38, (1891), this Act was held to be *intra vires* by the Quebec Superior Court, but without any special reference to the above section 6. And as to the right of provincial legislatures to prescribe a remedy for civil trespass, see the subject discussed in 6 C.L.J., N.S., at pp. 86-7. In his report as Minister of Justice, of December 24th, 1894, on the Nova Scotia Acts of 1894, Sir C. H. Tupper says :—" The subject of malicious injury to property appertains to criminal law, and has been so dealt with under the

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Lastly, in *Ex parte* Ellis,[1] another example is found which is in point. There a case arose before the Supreme Court in New Brunswick as to the validity of a provincial Act,[2] which provided for the imprisonment of a person making default in payment of a sum due on a judgment, in case (amongst other things) the liability was incurred by obtaining credit under false pretences, or by means of any other fraud, or by the commission of an act for which he might be proceeded against criminally. It was contended that this was *ultra vires*, because it indirectly attempted to punish a person for criminal offences, and created a tribunal to adjudicate thereon, and that this was legislating on the criminal law, and Weldon, J., so held; but the majority of the Court held that the Act was a valid Act, because rightly viewed it was an Act for enforcing the payment of judgments, and in the words of Allen, C.J.:—"Surely the enforcing the payment of a judgment is a civil right, and the mode of enforcing it a part of the administration of justice and procedure in civil matters in the province, all of which are expressly within the jurisdiction of the provincial legislature."

Enforcing judgments by imprisonment in cases of fraud.

Criminal Code. It is, therefore, beyond the power of the local legislature to constitute the malicious injury of property either general or as regards a particular class of property an offence, or to declare what shall be the punishment of such an offence." He recommends, however, that the matter be left to the Courts to deal with. And in a report of October 10th, 1894, on the Manitoba Acts of 1894, Sir John Thompson, as Minister of Justice, takes similar grounds on the same subject. In his report of November 2nd, 1895, on 58 Vict. c. 48, O., being an Act for the Prevention of Fraud in the Sale of Fruit, Sir C. H. Tupper says:—"The main object of this chapter is to constitute offences and establish penalties in respect to fraud in the packing and sale of fruit, and it appears to relate rather to the subject of criminal law than to any matter of legislation which has been committed to the provinces." He recommends, however, that the matter be left to the Courts.

The view of Ministers of Justice.

[1] 1 P. & B. 593, 2 Cart. 527, (1878).

[2] Con. Stat. N.B., c. 38, ss. 30, 32.

PROPOSITION 36.

36. The true nature and character of the legislation in the particular instance under discussion—its grounds and design and the primary matter dealt with—its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs, and any merely incidental effect it may have over other matters does not alter the character of the law.

Russell *v.* The Queen.

The above Proposition, as has already been stated in the notes to Proposition 35, is laid down by the Privy Council in Russell *v.* The Queen,[1] and the way in which it is there illustrated has been pointed out. It may be added that later on in the same judgment[2] their lordships held that though the Canada Temperance Act, 1878, which was the Act in question, was to be brought into force in those localities only which adopted it by local option exercised in the prescribed manner, it was nevertheless not to be considered as relating to matters of a merely local or private nature within the province, within the meaning of No. 16 of section 92 of the

[1] 7 App. Cas. at pp. 838-40, 2 Cart. at pp. 21-3, (1882), cited by Armour, C.J., in Regina *v.* Wason, 17 O.R. at p. 61, 4 Cart. at p. 614, (1889),' who says:—"We have to ascertain therefore the primary object of the Act in question." See *supra* pp. 396-7.

[2] 7 App. Cas. at p. 841, 2 Cart. at p. 25.

British North America Act, and say :—" The objects and scope of the legislation are still general, namely, to promote temperance by means of a uniform law throughout the Dominion." Prop. 36

And the previous decision of the Board in Attorney-General of Quebec *v.* The Queen Insurance Company[1] also affords an excellent example of the principle under discussion. There it appeared that the provincial Act of Quebec, 39 Vict., c. 7, purported to be on the face of it an exercise of the powers conferred by No. 9 of section 92, as to " shop, saloon, tavern, auctioneer, and other licenses," and to impose a license on persons carrying on the business of assurance in the province, but as a matter of fact did not compel the supposed licensee to take out or pay for a license, but merely provided that " the price of such license " should consist of an adhesive stamp to be paid in respect to each transaction, not by the licensee, but by the person who dealt with him. Their lordships held that the Act was virtually a Stamp Act, and not a License Act, and they further held that it was not direct taxation,[2] and was *ultra vires*. They say[3] :—" The result is this, that it is not in substance a License Act at all; it is nothing more nor less than a simple Stamp Act on the policies, with provisions referring to a license, because, it

Angers *v.* Queen Insurance Co.

Stamp Act under guise of License Act.

[1] 3 App. Cas. 1090, 1 Cart. 117, (1878), also cited as Angers *v.* The Queen Insurance Company.

[2] On this point Crawford *v.* Duffield, 5 M.R. 121, (1888), may be referred to, where the Manitoba Act, 49 Vict., c. 51, was held *intra vires*, which enacted that:—"All duties and fees of office payable in law stamps on any search, filing, pleading . . . in virtue of any statute, rule, or order, now or hereafter in force, are hereby declared to be a direct tax and duty imposed upon the party directed to pay or paying the same, in order to the raising of a revenue for provincial purposes, and shall not be in any way taxable or recoverable as costs by the said party from any other party or person whatsoever." And as to direct taxation generally, see, further, the notes to Proposition 66.

[3] 3 App. Cas. at p. 1099, 1 Cart. at p. 128.

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must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license."

And in the argument on The Liquor Prohibition Appeal, 1895,[1] Lord Watson says:—"We are always inclined to stand on what is the main substance of the Act in determining under which of these provisions it really falls. That must be determined *secundum subjectam materiam*, according to the purpose of the statute, as that can be collected from its leading enactments. When a legislature proceeds to enact that not less than a certain quantity of liquor shall ever be sold retail, what is the object of it? Is it for the physical benefit of the population that they are legislating? Is it because small quantities should not in their opinion be sold to any one who wants a drink? Or is it because they want to regulate the trade?" Again, later on,[2] he says:—"There may be a great many objects, one behind the other. The first object may be to prohibit the sale of liquor, and prohibition the only object accomplished by the Act. The second object probably is to diminish drunkenness; the third object to improve morality, and good behaviour of the citizens; the fourth object to diminish crime, and so on. These are all objects. Which is the object of the Act? I should be inclined to take the view that that which it accomplished, and that which is its main object to accomplish, is the object of the statute; the others are mere motives to induce the legislature to take means for the attainment of it."

Must discover real object and main substance of Acts;

[1] At p. 184; see p. 398, n. 1, *supra*. This case is now reported in [1896] A.C. 348.

[2] At pp. 317-8.

As Graham, E.J., says, in Queen *v.* Ronan,[1] of the Act there in question:—"The Act may be in effect a Temperance Act, but it is something else."[2] Prop. 36

And so in Clarkson *v.* The Ontario Bank[3] Hagarty, C.J.O., says that what we have to look at in an Act "is its general scope and effect . . . The main purpose of the enactment must be looked to." And Osler, J.A., says[4] that we must have regard to "the scope, object, and effect" of the provisions of the Act.[5]

The true character and nature of the legislation.

And to refer again to two cases already incidentally noticed in the notes to the last Proposition,[6] Regina *v.* Wason,[7] and Regina *v.* Stone,[8] Osler, J.A., observes in the former,[9] that the proposition that it is by determining the true character and nature of the legislation in the particular instance that the class of subjects to which it really belongs is to be ascertained "merely states the difficulty which presents itself at the threshold of every case in which

[1]23 N.S. at p. 450, (1891).

[2]Wilson, C.J., says in Regina *v.* Taylor, 36 U.C.R. at p. 206, (1875):—"If objects of legislation are lawful objects, and if they can be properly adopted, they do not become unlawful because they cannot be wholly separated from every other matter, or because they are attended with their inevitable consequences."

[3]15 O.A.R. at pp. 174-6, 181, 4 Cart. at pp. 508-11, 516. See as to the constitutionality of the Act there in question, Attorney-General of Ontario *v.* Attorney-General of Canada, [1894] A.C. 189.

[4]S.C. 15 O.A.R. at p. 193, 4 Cart. at p. 530.

[5]As Ramsay, J., observes in Hamilton Powder Company *v.* Lambe, M.L.R. 1 Q.B. at p. 466, (1885):—"It cannot be pretended that a government with the general powers which the local legislatures have must on every occasion express its authority in so many words."

[6]See *supra* at pp. 413-4.

[7]17 O.A.R. 221, 4 Cart. 578, (1890).

[8]23 O.A.R. 46, (1892).

[9]17 O.A.R. at p. 239, 4 Cart. at p. 597.

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the question arises"; and applying the test to the Ontario Act then in question, being 'An Act to provide against frauds in the supplying of milk to cheese and butter manufactories,' he says[1]:—"What, then, is the real character and scope of the Act? Does it operate to enlarge the borders of the criminal law, as that expression is used in section 91, sub-section 27, of the British North America Act; or is it concerned primarily with property and civil rights, providing for its enforcement by fine and imprisonment, as may lawfully be done where the principal matter is within the class of subjects comprised in section 92?" And he and all the judges of the Ontario Court of Appeal decided in favour of the latter alternative, and held the Act to be *intra vires* of the provincial legislature. And so, on the other hand, in Regina *v.* Stone,[2] the Ontario Common Pleas Divisional Court held the corresponding Dominion Act, 52 Vict., c. 43, to be likewise *intra vires*, Rose, J., observing (at p. 49):—"As has been pointed out in Regina *v.* Wason, the Act of the legislature differs in form from the Act of Parliament in that under the former the offence consists in doing certain things without notifying in writing the owner or manager of the cheese or butter manufactory. The Act in question forbids all persons doing the acts therein stated, and is in form similar to other Acts found upon the pages of the revised statutes of Canada creating crimes." And he cites as apposite the words of Maclennan, J.A., in Regina *v.* Wason,[3] as to the Dominion Act, that "it is universal in its scope and application, and prohibits the forbidden

An apparent criminal Act may be really only regulation of a trade.

Reg. *v.* Stone and Reg. *v.* Wason.

[1] 17 O.A.R. at pp. 239-40, 4 Cart. at p. 598.

[2] 23 O.R. 46, (1892).

[3] 17 O.A.R. at p. 248, 4 Cart. at pp. 607-8.

acts by all persons whomsoever under all circumstances, and in all places throughout the Dominion, while the provincial Act is confined to the dealings between these two particular kinds of manufacturers and their customers. The one has all the features of a public criminal law passed in the interest of the general public; the other is merely the regulation of the mode of carrying on a particular trade or business within the province, so as to secure fair and honest dealing between the parties concerned."[1] Prop. 36

Lynch *v.* The Canada North-West Land Company[2] also well illustrates the leading Proposition. There the Supreme Court of Canada, over-ruling the Manitoba Courts, held (Gwynne, J., dissenting) that a provincial Act imposing an obligation to pay an additional 10 per cent. on the original amount of municipal taxes, if not paid by a certain date, was only an additional rate or tax imposed as a penalty for non-payment, which the local legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and was not "interest" within the meaning of No. 19 of section 91 of the British North America Act, although in the same Act the legislature more than once called the addition to the taxes "interest." At pp. 210-13, Ritchie C.J., says:—"I care not by what name this 10 per cent. may be called; it was to all intents and purposes, in the case before us, an additional tax. . . . Had it been specifically named as interest I am of opinion that it was an incident to the right of taxation vested in the municipal authority, and, though more than the rate allowed by the Dominion statute in matters of contract, in no way in

Expressions used in Acts may be misleading.

"Interest" in No. 19 of sect. 91, B.N.A. Act.

[1] See *supra* p. 414.

[2] 19 S.C.R. 204, (1891).

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conflict with the authority secured to the Dominion parliament over interest by the British North America Act.[1] . . In the present case the legislature was not dealing or professing to deal with the question of interest, but was dealing exclusively with taxation under municipal institutions." Patterson, J., adds (at p. 226):—"The imposition may not improperly be regarded as a penalty for enforcing the law relating to municipal taxation, and in that character it comes directly under Article 15 of section 92."

The power depends on the thing done, not the words used.

This may recall the way in which, in the case of Pillow *v.* The City of Montreal,[2] referred to in the notes to the last Proposition, (at pp. 412-3), the Court of Queen's Bench in Montreal held that the fact that a term of the criminal law, viz., "nuisance," was used in a local Act to characterize an offence within the jurisdiction of the local legislature did not make the enactment *ultra vires* when the offence was not *per se* an indictable offence at common law. As Ramsay, J., says (at p. 413). if a "local law declared it to be 'a common nuisance' not to clear the snow away from the footpath, the law would not by that be *ultra vires*. The power depends on the thing done, not on the words used to set it forth."[3] Nevertheless, it may be, in the words of Weatherbe, J., in The Queen *v.* Ronan,[4]

[1] As to this see the notes to Proposition 37; and as to this case of Lynch *v.* The Canada North-West Land Co., see *supra* pp. 389-90. Also, see p. 398, n. 1.

[2] M.L.R. 1 Q.B. at p. 401, (1885).

[3] In 1887 the Minister of Justice reported that he found a Manitoba Act entitled "An Act respecting promissory notes and bills of exchange" to be really an Act respecting evidence, and on that ground recommended that it be left to its operations; Hodgins' Provincial Legislation, Vol. 2, at p. 196.

[4] 23 N.S. at p. 433, (1891).

that:—"We all know how a few seemingly harmless clauses, even a few phrases, a line, or even a word, inserted in a law, may entirely change or disfigure the whole features of the legislation." Prop. 36

Again, in Tai Sing *v.* Maguire[1] we find another striking application of the same rule. There Gray, J., was dealing with the British Columbia Chinese Tax Act, 1878, which was entitled 'An Act to provide for the better collection of provincial taxes from Chinese,' and by its preamble professed to prevent the evasion by the Chinese of the payment of taxes, and to enact its provisions as a more simple method for the better collection of provincial taxes from Chinese. Gray, J., however, on an examination of its enacting clauses, held that it was plain that it was not intended to collect a revenue, but to drive the Chinese from the country, thus interfering at once with the authority reserved to the Dominion parliament as to the regulation of trade and commerce, the rights of aliens, and the treaties of the Empire, and on this ground he held it to be *ultra vires*.[2] And (at p. 104) he observes:—"The preamble is really no substantial part of an Act. It is simply the professed light by which it is alleged the Act should be read; but in determining the objects of the Act, we must look, not at the preamble, but really at its enacting clauses." Act for exclusion of Chinese under guise of tax Act.

In The Queen *v.* Ronan,[3] Weatherbe, J., observes:—"We must read the whole Act. If we find, even in a License Act, provisions which show clearly that the main intention and scope of the Act is to put an end to drunkenness, and if we find that Must read whole Act.

[1] 1 B.C. (Irving) 101, (1878).

[2] *Ib.* at p. 112. See, also, *supra* pp. 257-9.

[3] 23 N.S. at p. 433.

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such an Act, strictly carried out, would make it intolerable for any man to engage in the trade, then our enquiry must be still whether the province has not such a power." And before leaving our present subject it may be well, also, to recall the words of Allen, C.J., in The Queen *v.* The City of Fredericton[1] :—"If the aid of some of the classes of subjects enumerated in the 91st section of the British North America Act can be invoked, whenever they may incidentally touch an Act of the parliament of Canada, although, in fact, foreign to the purposes of such Act, and not necessarily and directly involved in the legislation, there is hardly any subject which could not be reached by the parliament. In some sense or other, in connection with 'trade,' it might legislate upon what we shall eat, and what we shall drink, and wherewithal we shall be clothed."

Act may incidentally touch subjects foreign to its real purposes.

In conclusion, it must, of course, be remembered that when once it is clear to what class any particular Act belongs, and, therefore, whether it is within the jurisdiction of Parliament, or within that of the provincial legislature, the motive which induced Parliament, or a local legislature, to exercise its power in passing it cannot affect its validity, as pointed out in Proposition 20[2]; and in this connection we may refer again to the case already mentioned in the notes to Proposition 34[3] of the European and North America R.W. Co. *v.* Thomas.[4]

Courts not concerned with motives of legislature if Act *intra vires.*

[1] 3 P. & B. at p. 187, (1879).

[2] See specially at pp. 277-8.

[3] See *supra* at p. 391.

[4] 1 Pugs. 42, 2 Cart. 439, (1871).

PROPOSITION 37.

37. In assigning to the Dominion Parliament legislative jurisdiction in respect to the general subjects of legislation enumerated in section 91 of the British North America Act, the Imperial statute, by necessary implication, intended to confer on it legislative power to interfere with [deal with, and encroach upon] matters otherwise assigned to the Provincial Legislatures under section 92, so far as a general law relating to those subjects so assigned to it may affect them, [as it may also do to the extent of such ancillary provisions as may be required to prevent the scheme of such a law from being defeated].

As to the applicability of a similar principle *mutatis mutandis* to Provincial Legislatures, *quære*.[1]

The above important Proposition will be found stated and illustrated with reference to bankruptcy and insolvency in the judgment of the Privy Council

[1]Mr. Clement, in his Law of the Canadian Constitution, at p. 349, remarks :—"It is noteworthy that the Judicial Committee of the Privy Council have never used the phrase 'implied powers,' preferring the other form, 'plenary powers.'" Yet, as will be seen in the passage in their judgment from which the above Proposition is derived, they use the expression "necessary implication."

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in Cushing *v.* Dupuy,[1] excepting as to the two clauses enclosed in square brackets, the former of which, as will be seen, is derived from their lordships' judgment in The Liquor Prohibition Appeal, 1895,[2] and the latter from their judgment in the case respecting the Ontario Assignment for Creditors' Act.[3] In Cushing *v.* Dupuy it was "very faintly urged," to use the expression in the judgment, that the provisions of the Insolvency Act, 1875, as amended by 40 Vict., c. 41, D., interfered with property and civil rights, and was *ultra vires ;* and it was "strongly contended" that the parliament of Canada could not take away the right to appeal to the Queen from final judgments of the Court of Queen's Bench, as it was alleged to have done by 40 Vict., c. 41, s. 28, because this, it was said, was part of the procedure in civil matters exclusively assigned to the legislature of the province. Their lordships say[4]: — "The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is, therefore, to

Cushing *v.* Dupuy.

Bankruptcy and insolvency.

[1] 5 App. Cas. 409, 1 Cart. 252, (1880). Johnson, J., had previously held otherwise in Fraser Institute *v.* More, 19 L.C.J. 133, (1875).

[2] [1896] A.C. at p. 360. See p. 393, n. 1, *supra.*

[3] Attorney-General of Ontario *v.* Attorney-General for the Dominion of Canada, [1894] A.C. at p. 200. See as to this decision an article in 30 C.L.J. 182.

[4] 5 App. Cas. at p. 415, 1 Cart. at p. 258.

be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to these subjects might affect them."[1] Prop. 37

As the Privy Council again say in Tennant *v.* The Union Bank of Canada[2]:—"Section 91 expressly declares that 'notwithstanding anything in this Act,' the exclusive legislative authority of the parliament of Canada shall extend to all matters coming within the enumerated classes, which plainly indi- Tennant *v.* The Union Bank.

[1] In the argument before the Privy Council in Russell *v.* The Queen, on May 2nd, 1882, Sir R. Collier observes:—"If you take the widest possible meaning of 'property and civil rights in the province,' it would give the province the right of legislation with regard to everything, and would take from the Dominion parliament the power of legislating about anything. You must take it with certain restrictions": (see the transcript from Marten & Meredith's shorthand notes in the possession of the Department of Justice at Ottawa, first day, at p. 37). And in the argument before their lordships in the matter of the Dominion License Acts 1883-4, in November, 1885, Sir Farrer Herschell *arguendo* puts the matter thus:—"The truth is hardly anything could be done by the Dominion parliament which would not affect a man's civil right, which is to do everything which the legislature has not said he may not do. You could not have any legislation without its affecting matters in a locality, because the person who offends, or is prevented from doing the thing, is in some locality or other. Therefore, it is clear, the exclusive power with regard to property and civil rights, and with regard to matters of a local character, must have very considerable limitations." Upon which Sir Montague Smith, one of the Board, observed:—"The fact that a legislation may be under one section or the other is one of the great difficulties in the construction of this," (*sc.*, the British North America), "Act." For judicial *dicta* in harmony with the above words of the Privy Council in Cushing *v.* Dupuy, in addition to those presently to be referred to, see per Harrison, C.J., in Ulrich *v.* The National Insurance Company, 42 U.C.R. at pp. 156-7, (1877); per Spragge, C.J.O., in Peek *v.* Shields, 6 O.A.R. at p. 647, 3 Cart. at p. 275, (1880), as to which case see *infra* p. 439; per Osler, J.A., in Clarkson *v.* The Ontario Bank, 15 O.A.R. at p. 190, 4 Cart. at p. 527, (1888); per Patterson, J.A., in Edgar *v.* The Central Bank, 15 O.A.R. at p. 207, 4 Cart. at p. 547, (1888); per Strong, J., in Quirt *v.* The Queen, 19 S.C.R. at p. 517, (1891). Property and civil rights in the province.

[2] [1894] A.C. at p. 45.

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cates that the legislation of that Parliament, so long as it strictly relates to those matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian parliament. For example, among the enumerated classes of subjects in section 91 are 'Patents of Invention and Discovery' and 'Copyrights.' It would be practically impossible for the Dominion parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces."[1] And, consonantly thereto, they held in that case that inasmuch as warehouse receipts taken by a bank in the course of the business of banking were matters coming within the class of subjects described in section 91 as 'banking, incorporation of banks, and the issue of paper money,'[2] the provisions of the Dominion Banking Acts relating to such warehouse receipts were *intra vires*, though with the effect of modifying civil rights in the province, and conflicting with

The *non obstante* clause of sect. 91 of B.N.A. Act.

Banking, and warehouse receipts.

[1] And so Gwynne, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 566, 2 Cart. at p. 58, (1880), says:—"The previous part of section 91, in the most precise and imperative terms, declares that 'notwithstanding anything in this Act,'—notwithstanding, therefore, anything whether of a local or private nature or of any other character, if there be anything of any other character, enumerated in section 92, the exclusive legislative authority of the parliament of Canada extends to all matters coming within the class of subjects enumerated in section 91." See, also, *supra* p. 308, n. 1, which, however, was written and printed before the delivery of the recent judgment of the Privy Council in The Liquor Prohibition Appeal, 1895, [1896] A.C. 348, presently to be referred to. See *supra* p. 393, n. 1. And as to the *non obstante* clause in section 91, see per Wilson, C.J., in *Re* Niagara Election Case, 29 C.P. at p. 296, (1878), who, at p. 295, seems somewhat to misstate the view expressed by Johnson, J., in Ryan *v.* Devlin, 20 L.C.J. 77, (1875); see the latter case at p. 83; and see also Proposition 33 and the notes thereto.

[2] "Paper money" they held necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province did not and could not attach to it, and "banking" they held is an expression wide enough to include everything coming within the legitimate business of a banker.

statutory regulations in Ontario, under provincial Acts, with respect to the form and legal effect in that province of warehouse receipts and other negotiable documents which passed the property of goods without delivery. Prop. 37

Again, in the case of the Ontario Assignment for Creditors Act, Attorney-General of Ontario *v.* Attorney-General of Canada,[1] the Board gave utterance *obiter* to important *dicta* in reference to the subject under discussion, which seem to carry the matter somewhat further than their two judgments already mentioned. After stating that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated,[2] it may be necessary, they say, for this purpose, to deal with the effect of executions, and other matters which would otherwise be within the legislative competence of the provincial legislatures; again, provision might be made for a voluntary assignment as an alternative to compulsory bankruptcy proceedings, designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors, though an assignment for the general benefit of creditors is no essential part of a bankruptcy law, but has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. And they add:—"Their lordships do not doubt that it would be open to the Dominion parliament to deal with such matters as part of a

The Assignment for Creditors case.

Provisions ancillary to bankruptcy legislation.

[1] [1894] A.C. 189.

[2] See Proposition 27 and the notes thereto. The grant of general legislative power carries with it the power to enact minor provisions incidental to the principal purpose of the Act: see per Osler, J.A., in Regina *v.* County of Wellington, 17 O.A.R. at p. 444, (1890).

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bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with the legislation, inasmuch as such interference would affect a bankruptcy law of the Dominion parliament";[1] and, as will presently be seen, there have been decisions in our own Courts illustrating the principle thus laid down.

Bankruptcy and insolvency.

As Patterson, J.A., says in Edgar *v.* The Central Bank[2]:—"A bankrupt or insolvent Act will, of necessity, include many such interferences," (*sc.*, with property and civil rights), "and may with propriety make provisions of the kind," (*sc.*, imposing restrictions upon the disposition of his property by a person who is insolvent), "for the better carrying out of the systems which may yet not be of the essence of a bankrupt or insolvent law."

Liquor Prohibition Appeal, 1895.

And in their recent judgment in the matter of The Liquor Prohibition Appeal, 1895,[3] their lordships say that the parliament of Canada has power "to deal with" local or private matters referred to in the sixteen classes enumerated in section 92, "in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91."[4]

[1] See as to this Proposition 46 and the notes thereto; also Propositions 17 and 62.

[2] 15 O.A.R. at p. 207.

[3] [1896] A.C. 348. See p. 393, n. 1, *supra.*

[4] Somewhat strangely, the Privy Council base this here upon the concluding clause of section 91 of the British North America Act, which enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." They refer to their prior decisions in Citizens Insurance Co. *v.* Parsons, 7 App. Cas. at pp. 108-9, 1 Cart. at pp. 272-3, Cushing *v.* Dupuy, 5 App. Cas. at p. 415, 1 Cart. at p. 258, Tennant *v.* The Union Bank of Canada, [1894]

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The above passages from the judgments in the cases just referred to of Tennant *v.* The Union Bank,[1] and the Attorney-General of Ontario *v.* The Attorney-General of Canada,[2] seem to point to a distinction indicated in the leading Proposition, between cases where the exclusive right of the Dominion parliament to legislate on what would otherwise fall within the classes of provincial subjects enumerated in section 92 is involved *ex vi termini* in one of the enumerated classes of subjects assigned to Parliament in section 91, being necessarily included in any complete definition of the latter subjects, and cases where a portion of what actually is the provincial area of legislative power,—as being included in one or other of the classes in section 92 even when defined in such a way as to exclude matters strictly within the enumerated classes in section 91,—may nevertheless be legitimately invaded by the Dominion parliament so far as required to complete by ancillary provisions the

Dominion power over provincial area.

A.C. at p. 46, and Attorney-General of Ontario *v.* Attorney-General of the Dominion, [1894] A.C. at p. 200, as cases in which the same view of the powers of the Dominion parliament was stated and illustrated. Now, in the first of these cases they refer, it is true, to the concluding clause of section 91, as "this endeavour to give pre-eminence to the Dominion parliament in cases of a conflict of powers"; but, as we have seen, in Tennant *v.* The Union Bank of Canada they base the Dominion jurisdiction referred to upon the prior words in section 91, "notwithstanding anything in this Act," nor do they in that or in the cases of Cushing *v.* Dupuy, or Attorney-General of Canada *v.* Attorney-General of the Dominion, refer to the concluding clause in section 91. With great submission, as held by Strong, J., in Quirt *v.* The Queen, 19 S.C.R. at p. 516, and urged in the notes to Proposition 59, *infra*, the primary significance of the concluding clause in section 91 is that provincial legislatures cannot legislate for their own provinces on any of the matters enumerated in section 91 under the pretence or the contention that the legislation is of a provincial or local character. See, however, per Gwynne, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 212-13, (1895); per Ritchie, C.J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 540, 2 Cart. at pp. 38-9, (1880).

[1] [1894] A.C. 31.

[2] [1894] A.C. 189.

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effectual exercise of the powers given to it by the enumerated subjects in section 91.

Thus there is no doubt a sense in which it may be said (subject to what is hereafter stated as to the application of our leading Proposition *mutatis mutandis* to the provincial legislatures), in the words of Taschereau, J., in Valin *v.* Langlois[1]:—"The authority of the Federal power, it seems to me, over the matters left under its control, is exclusive, full, and absolute, while as regards at least some of the matters left to the provincial legislatures by section 92 the authority of these legislatures cannot be construed to be as full and exclusive, when by such construction the Federal power over matters especially left under its control would be lessened, restrained, or impaired."[2] And there is also a sense in which it may be said in the words of Gwynne, J., in Citizens Insurance Company *v.*

The absolute character of Federal powers.

[1] 3 S.C.R. at p. 77, 1 Cart. at p. 209, (1879).

[2] However, it is laid down in Bank of Toronto *v.* Lambe, 12 App. Cas. at p. 586, 4 Cart. at p. 22, (1887), that where a power falls within the legitimate meaning of any class of subjects reserved to the local legislatures by section 92 of the British North America Act the control of these bodies is as exclusive, full, and absolute as is that of the Dominion parliament over matters within its jurisdiction. See Proposition 61 and the notes thereto. At all events, putting aside any question of power to encroach upon what may be called foreign territory by way of provisions ancillary to legislation within the proper territory of Parliament or the provincial legislatures, the matter would seem to be one entirely of construction of the Act, that is, of properly defining the various classes of subjects enumerated in sections 91 and 92, the general language used in section 91 having to be modified by reason of the language used in section 92 in some cases, as much as the general expressions used in section 92 by reason of the language used in section 91. See Propositions 39, 40, 41, and, also, Proposition 46 and the notes thereto. As Dunkin, J., says in Cooey *v.* The Municipality of the County of Brome, 21 L.C.J. at p. 185, 2 Cart. at p. 387:—"There is a possible sense of words, under which the exclusive power to legislate as to 'property and civil rights in the province' might involve the power to legislate at least in some measure for 'regulation of trade and commerce' therein. But a sense must be sought on the one hand for the words 'trade and commerce,' and on the other for the words 'property and civil rights,' which shall not involve this consequence."

Parsons,[1] that:—"What is vested in the local legislatures by item 13 of section 92 is only jurisdiction over so much of property and civil rights as may remain after deducting so much of jurisdiction over those subjects as may be deemed necessary for securing to the Parliament exclusive control over every one of the subjects enumerated in section 91—the residuum, in fact, not so absorbed by the jurisdiction conferred on the Parliament." Prop. 37

Property and civil rights in the Province.

Perhaps, however, it will correctly express the result of the decisions, as we have them now, to say, (1) that the provincial legislatures have general jurisdiction, and they alone have general jurisdiction, over property and civil rights in the province; but that this is not to be understood, on the one hand, as meaning that they can legislate upon any of the subjects assigned exclusively to the parliament of Canada by section 91; nor is it to be understood, on the other hand, as meaning that the parliament of Canada cannot incidentally affect property and civil rights by its legislation, so far as such power is implied in its power to legislate upon the subjects exclusively assigned to it by section 91, or so far as is required as ancillary to the power to legislate effectually and completely on such subjects[2]; and (2) that as, on the one hand, the operation of Acts of the provincial legislatures respecting property and civil rights in the province, or other provincial subjects, may be interfered with by reason of the operation of Acts of the Dominion parliament, so, also, Dominion Acts may be interfered with by reason of the operation of Acts of the provincial legislature,[3]

Summary of the law.

[1] 4 S.C.R. at p. 330, 1 Cart. at p. 336, (1880). Cf. Attorney-General of Ontario *v.* Mercer, 8 App. Cas. at p. 776, 3 Cart. at p. 12, (1883).

[2] See the remarks of Lord Watson quoted *supra* pp. 357-8.

[3] See Proposition 61 and the notes thereto.

Prop. 37 though Dominion legislation, whether on one of the enumerated classes in section 91, or by way of provisions properly ancillary to legislation on one of the said enumerated classes, will override and place in abeyance provincial legislation which directly conflicts with it.[1]

And so Fisher, J., in Steadman *v.* Robertson,[2] says :—"In conferring upon the local legislatures the power to legislate upon property and civil rights,

Property and civil rights in the Province.

I am of opinion it was the intention that this power should only be trenched upon to the extent required to enable Parliament to exercise the authority to legislate upon the different subjects assigned to it, and the Parliament, in legislating upon the subjects within its competency, can only so far interfere with property and civil rights as is necessary to work out the legislation upon the particular subjects delegated to it."[3] And Fournier, J., in Valin *v.* Langlois,[4] refers to the subject thus :—"To the legislatures alone belongs, without doubt, the right of regulating civil rights in the province, as well as the organization of Courts of justice for the province, and the Federal parliament would certainly exceed its power if it were to legislate on these matters for the prov-

[1] See Proposition 46 and the notes thereto.

[2] 2 P. & B. at pp. 595-6, (1879).

[3] See as to this limitation *infra* p. 448, *et seq.* So, also, in the United States, the federal power has exercised its jurisdiction over civil rights and contracts. It having been settled, for instance, by judicial construction, that navigation was under federal control, Congress has enacted laws regulating the form and nature of the contract of hiring the ships' crews. It has altered the obligations imposed by the common law on the contracts made by shipowners as common carriers, and, though the validity of this enactment has never been directly decided upon by the Supreme Court, it has been brought before that tribunal in such a way that their silence was equivalent to a positive and formal judgment in favour of its validity, as demonstrated in Pomeroy's Constitutional Law, 8th ed., section 381 : per Taschereau, in Citizens Insurance Co. *v.* Parson, 4 S.C.R. at p. 308, 1 Cart. at p. 327.

[4] 3 S.C.R. at p. 53, 1 Cart. at pp. 191-2, (1879).

ince. But does it necessarily follow that the latter has no jurisdiction over civil rights which concern only the Dominion in general, as well as over the organization and maintenance of Courts, in so far as the Dominion is interested? Do these two paragraphs," (*sc.*, Nos. 13 and 14 of section 92), "contain an absolute exclusion of all jurisdiction in the Dominion parliament? I do not think so. It seems to me, on the contrary, that these very terms are opposed to an interpretation so restricted. In fact, the words 'in the province,' following the enumeration of the powers given over civil rights, and the organization of Courts, effectually confine the exercise of these powers to the limits of the province, but do not go so far as to exclude the exercise by the Federal parliament of a similar jurisdiction over the different classes of civil rights which are confided to it. Nothing is clearer or more certain than that the legislatures have not complete jurisdiction over civil rights."

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Property and civil rights in the Province.

It will be observed that our leading Proposition has reference only to the enumerated subjects of legislation in section 91, but it would be impossible for Parliament to legislate even under its general residuary power 'to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by the British North America Act assigned exclusively to the legislatures of the provinces,' if it was restricted from incidentally affecting property and civil rights in the different provinces and other matters assigned to the latter.[1] And so in Russell *v.* The Queen,[2] the Privy Council held that the

The general residuary power of Parliament.

[1] See at p. 316, n. 1, *supra*.

[2] 7 App. Cas. 829, 2 Cart. 12, (1882).

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Canada Temperance Act, 1878, was within the competency of the Dominion parliament to pass, its primary object and design being to preserve public order and safety, although its provisions might incidentally affect and interfere with property and civil rights, and although its effect might be practically to deprive local legislatures of the power to raise a revenue from licenses, which they would otherwise have.[1] Their lordships point out that although such legislation may interfere with the sale or use of an article included in a license granted under sub-section 9 of section 92 of the British North America Act, it "is not in itself legislation upon or within the subject of that sub-section, and consequently is not by reason of it taken out of the general power of the parliament of the Dominion."[2] And, as we have seen, they deduce the proposition that "the true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subject to which it really belongs."[3]

May incidentally affect provincial subjects.

Russell *v.* The Queen.

[1] Thus in some degree the powers of provincial legislatures must depend upon the action of the Dominion parliament, notwithstanding the *dictum* of Henry, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at pp. 555-6, 2 Cart. at p. 50, (1880), that it should not be so, and that we must so define the power given severally to parliament and local legislatures "that neither will have to depend on the forbearance of the other." See, also, Propositions 46, 48, and 61, and the notes thereto.

[2] 7 App. Cas. at p. 838, 2 Cart. at p. 21.

[3] See *supra* pp. 396-7, and Proposition 36 and the notes thereto. And in the same way it would seem that provincial legislatures may by their Acts incidentally touch Dominion subjects without thereby in any proper sense of the word legislating upon them. Thus in the case of *In re* De Veber, 21 N.B. at p. 425, 2 Cart. at p. 556, (1882), Palmer, J., held (with the concurrence of the majority of the New Brunswick Supreme Court) that an Act of the New Brunswick legislature providing that, as against the assignee of the grantor under any law relating to insolvency, a bill of sale shall only take effect from the time of the filing thereof was *intra vires*. And the judgment of the County Court judge, whose decision the Supreme Court of the province affirmed in that case, as reported at 21 N.B. at pp. 398-9,

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And in their recent judgment on The Liquor Prohibition Appeal, 1895,[1] the Judicial Committee deal with the subject of the distinction between the scope of the Dominion parliament when legislating on the enumerated subjects and when legislating under its general residuary power. As we have already seen, they state that it is free to deal with matters assigned to the provinces "in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91"; but they say "to those matters which are not specified among the enumerated subjects of legislation, the exception from section 92 which is enacted by the concluding words of section 91[2] has no application; and in legislating with regard to such matters the Dominion parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92"; and they proceed to explain their meaning to be that such legislation by Parliament as is last referred to "ought to be strictly confined to such matters as are unquestionably of Canadian interest and impor-

Liquor Prohibition Appeal, 1895.

Parliament and the provincial area.

seems to afford so clear an argument as to be worth quoting. He says:—"The Act in question does not profess to deal with the disposal or distribution of an insolvent's property; it is simply an Act for the protection of creditors, and to prevent frauds from being committed upon them. . . The local law of the province has power to deal with property and civil rights, and in so doing may prescribe the modes and conditions under which title to property may be acquired and held. This cannot be said to be legislating upon insolvency." But Weldon, J., it may be said, dissented, and held the Act *ultra vires*. See, also, the judgment of the Privy Council in the case of Attorney-General of Ontario *v.* Attorney-General of Canada, [1894] A.C. 189, respecting the Ontario Assignments for Creditors Act, referred to *supra* p. 429. And as to the power of provincial legislatures to touch Dominion subjects, see *infra* in the latter portion of the notes to this Proposition.

[1] [1896] A.C. 348, see p. 393, n. 1, *supra*.

[2] See p. 430, n. 4, *supra*.

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tance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92[1];" and ought not to be passed "in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion."[2] Parliament, they say, does not derive jurisdiction from the introductory provisions of section 91 "to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole."[3]

Parliament and the provincial area.

Returning to our leading Proposition, many illustrations of it are to be found in the cases in connection with the subject of bankruptcy and insolvency. Thus in Kinney *v.* Dudman,[4] in entire conformity with the *dicta* of the Privy Council in the case respecting the Ontario Assignments for Creditors Act, quoted *supra* at pp. 429-30, the Supreme Court of Nova Scotia held that section 59 of the Dominion Insolvent Act of 1869, 32-33 Vict., c. 16, was within the competence of the Dominion parliament, though it provided that no lien or privilege upon the property of an insolvent should be created for a judgment debt by the issue or delivery to the sheriff of an execution, or by levying upon or seizing thereunder the effects or estate of an insolvent, if before the payment over to the plaintiff of the moneys levied the estate of the debtor had been

Bankruptcy and insolvency.

[1][1896] A.C. at p. 360. By "provincial legislation" their lordships evidently mean "provincial powers of legislation."

[2][1896] A.C. at p. 361.

[3][1896] A.C. at p. 361. See, also, Propositions 32 and 33 and the notes thereto.

[4]2 R. & C. 19, 2 Cart. 412, (1876).

assigned or placed in liquidation, thus overriding existing provincial legislation, giving to a creditor a lien on his debtor's property by the levy of his execution on it.[1] Prop. 37

And, again, the Dominion parliament, by the Insolvent Act of 1875, 38 Vict., c. 16, s. 136, having enacted in substance that any person who purchased goods on credit, knowing or believing himself to be unable to meet his engagements, and concealing the fact from the person thereby becoming his creditor, with the intent to defraud such person, and who should not afterwards have paid a debt so incurred, should be guilty of a fraud, and should be liable to imprisonment for such time as the Court might order, not exceeding two years, unless the debt and costs be sooner paid, it was held in Peek *v.* Shields,[2] that, although properly regarded, this was not an addition to our criminal law, but a matter of procedure or a mode of enforcing payment of the debt referred to, yet it was *intra vires* of the Dominion Bankruptcy and insolvency legislation.

[1] And the same Privy Council *dicta* may be considered as resolving in favour of the Dominion parliament the doubt expressed by Ritchie, C.J., in McLeod *v.* McGuirk, 2 Pugs. 248, (1874), as to whether section 81 of the Insolvent Act of 1869, 32-33 Vict., c. 16, D., restricting a landlord's preferential lien for rent to one year was not *ultra vires;* and to have shown to be erroneous the view of Wetmore, J., in that case (p. 259) that if the Act had attempted to take away the landlord's right of distress it would have been *ultra vires.* So, also, as to the decision of Wetmore, J., in McLeod *v.* Wright, 1 P. & B. 68, (1877), that section 89 of the Insolvent Act of 1869, which declared all sales, transfers, etc., by any person in contemplation of insolvency by way of security to any creditor whereby the latter obtains an unjust preference null and void, was *ultra vires* so far as operating upon property lawfully acquired by persons not insolvent, as being legislation upon property and civil rights. At pp. 149-50, he asks, where is the necessity to the carrying out of bankruptcy and insolvency legislation of "legislating away a solvent man's property honestly acquired, for the benefit of creditors who have, unfortunately, been dealing with a person who proves unable to pay his debts ?"

[2] 31 C.P. 112, 6 O.A.R. 639, 8 S.C.R. 579, 3 Cart. 266, (1880-3).

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parliament, because, as Osler, J., expressed it[1]: — "To legislate generally and effectually on the subject of bankruptcy and insolvency it is absolutely necessary that any well considered bankruptcy law, while providing for the distribution of the estate among the creditors, and for the relief of the honest debtor, should contain provisions calculated to deter dishonest or reckless trading and fraudulent bankruptcies." Burton, J.A., on the other hand,[2] considered that the enactment, though he agreed it was a mere matter of procedure, did not come within the general scope and scheme of a bankruptcy Act, and was *ultra vires*. And in the Supreme Court, Ritchie, C.J.,[3] holding the Act *intra vires*, and reiterating his language in Valin *v.* Langlois,[4] said: —"The right to direct the procedure in civil matters in the provincial Courts has reference to the procedure in matters over which the provincial legislature has power to give them jurisdiction, and does not in any way interfere with or restrict the right or power of the Dominion parliament to direct the mode of procedure to be adopted in cases in which the Dominion parliament has jurisdiction, and where it has exclusive authority to deal with the subject-matter as it has with the subject of bankruptcy and insolvency."[5]

Bankruptcy and insolvency legislation.

Procedure in the Courts.

[1] 31 C.P. at p. 124. See, also, per Galt, J., S.C., 31 C.P. at p. 125; per Spragge, C.J.O., S.C., 6 O.A.R. at p. 647, 3 Cart. at p. 275.

[2] 6 O.A.R. at p. 648, 3 Cart. at p. 276.

[3] 8 S.C.R. at p. 591.

[4] 3 S.C.R. at p. 15, 1 Cart. at p. 172.

[5] This language is also cited with approval by Osler, J.A., S.C., 31 C.P. at p. 122, and by Burton, J.A., S.C., 6 O.A.R. at p. 651, 3 Cart. at p. 280. And so per Gray, J., in the Thrasher Case, 1 B.C. (Irving) at p. 226, (1882), who remarks that otherwise the whole Dominion legislation, so far as it has to be carried out in the province,

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In like manner, under the principle of our leading Proposition, it was held, in Crombie *v.* Jackson,[1] that section 50 of the Insolvent Act of 1869, 32-33 Vict., c. 16, D., which provided that claims by and against assignees in insolvency might be disposed of by the judge of the County Court, or by the County Court on petition, and not by any suit, attachment, opposition, seizure, or other proceedings whatever, was not beyond the power of the Dominion parliament, Wilson, J., in the course of his judgment,[2] stating that, as an abstract proposition, it may be affirmed that if the Dominion legislature were to enact that some of the exclusive matters vested in Parliament,—for instance, bills of exchange and promissory notes,—should be litigated only in a particular local Court, say the Division Court, and not in any other Court whatever, such an enactment would be unconstitutional, because it would be an encroachment on the exclusive powers of the pro-

Bankruptcy and insolvency legislation.

Procedure in the Courts.

might be rendered nugatory. See, also, per Henry, J., in Valin *v.* Langlois, 3 S.C.R. at p. 64, 1 Cart. at p. 200. And cf. per Caron, J., in Dubuc *v.* Vallée, 5 Q.L.R. at p. 42, (1879). What is above stated as to 'property and civil rights in the province' would seem to apply here, *mutatis mutandis*, that is, that though the provinces alone have general jurisdiction over the administration of justice in the province by virtue of No. 14 of section 92, the Dominion parliament may deal with the matter, so far as is necessary to the complete and effectual exercise of one of its own enumerated powers; but, of course, in the absence of such Dominion legislation, the power to legislate remains in the province. And so the administration of justice in the province is only, strictly speaking, exclusively in the provincial jurisdiction in respect to the matters assigned to the legislatures by section 92. In the Thrasher Case above referred to, 1 B.C. (Irving) at p. 208, Crease, J., says:—"In the great majority of Dominion Acts there are provisions not only vesting jurisdiction in the Courts of the province, but also regulating in many instances and particulars the procedure in such matters in those Courts, *e.g.*, customs, inland revenue, public works, banks and banking, trade marks, fisheries, public lands, inspection of staples, aliens and naturalization, patents, insolvency, and a host of others."

No. 14 of sect. 92 of B.N.A. Act.

[1] 34 U.C.R. 575, 1 Cart. 685, (1874).

[2] 34 U.C.R. at pp. 579-80, 1 Cart. at p. 686.

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vincial legislatures, under No. 14, section 92, of the British North America Act, to make laws respecting the administration of justice in the province, etc. And, in Pineo *v.* Gavaza,[1] Thompson, J., referring to the view thus expressed by Wilson, J., in Crombie *v.* Jackson, says :—"The Dominion parliament probably had no power to enact that every one who has a cause of action against a certain class of persons must resort to a certain tribunal, and that all other Courts must be closed against him." And he held that the corresponding section in the Insolvent Act of 1875, 38 Vict., c. 16, D., s. 125, had no such general application ; that for the performance of those duties which arise from the Insolvent Act, and for the enforcement of those rights which are created by that Act, the remedy was that pointed out in the section ; but that where an assignee in insolvency had taken possession of goods mortgaged, shortly before the insolvency, to the plaintiff, the latter might bring replevin for them in the County Court, and was not driven to his remedy under the section.[2]

Dominion powers over civil procedure.

[1] 6 R. & G. (18 N.S.) at p. 489, (1885). See this case commented on 22 C.L.J., N.S., at pp. 70-2.

[2] It is quite in consonance with the above decisions and *dicta* that in McDonald *v.* McGuish, 5 R. & G. 1, (1883), followed in The Queen *v.* Wolfe, 7 R. & G. 24, (1886), it was held that there was no appeal to the Supreme Court of the province from a judgment of the County Court quashing a conviction by a magistrate under the Canada Temperance Act, as none was expressly given by the latter Act, although the provincial Acts creating and organizing the County Courts gave a general appeal to the Supreme Court of the province. It would indeed be *ultra vires* of a provincial legislature to confer a right of appeal from a judgment on *certiorari* quashing a conviction under the Canada Temperance Act : per Osler, J.A., in Regina *v.* Eli, 13 O.A.R. at p. 533, (1886), cited per Moss, C.J.A., in *In re* Boucher, 4 O.A.R. 191, as to rights of appeal in habeas corpus, who says that to extend the provisions of the provincial Act under discussion as argued "would be to alter criminal procedure over which the provincial legislature has no jurisdiction." Cf. Regina *v.* Lake, 43 U.C.R. 515, 2 Cart. 616 ; Regina *v.* Toland, 22 O.R. 505.

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So, again, in *In re* Bell Telephone Co.,[1] Osler, J.A., decided upon the leading principle which we are now considering, that section 28 of the Patent Act of 1872, 35 Vict., c. 26, D., which, after specifying certain cases in which patents are to be null and void, provided that in case dispute should arise under that section such disputes should be settled by the Minister of Agriculture or his deputy, whose decision should be final, was not *ultra vires*, "for," he observes, "though property and a civil right, it," (*sc.*, the patent), "is yet one of parliamentary creation, and I see no reason why the same power which gives it birth and limits the term of its existence should not also, as a matter of policy and for the purpose of effectual legislation on the subject, also provide a special mode of enquiring into and deciding upon the question whether the conditions upon which it was granted, to which it is expressed to be subject, and on which its existence depends, have been complied with." And he declares that on principle he cannot distinguish this legislation from a number of cases in which by Dominion Acts judicial powers are conferred in some cases on individual judges, in others on provincial Courts, to administer relief arising under Dominion Acts; such cases as are referred to by Ritchie, C.J., in Valin *v.* Langlois.[2]

Dominion powers over civil procedure.

[1] 7 O.R. 505, at p. 612, 4 Cart. 618, at p. 626, (1884). See per Henry, J., in Smith *v.* Goldie, 9 S.C.R. at pp. 68-9, (1882).

[2] 3 S.C.R. at pp. 23-4, 1 Cart. at p. 178, *et seq.*, (1879). Perhaps, however, the *ratio decidendi* of the above decision, as expressed in the passage quoted from the judgment of Osler, J.A., may seem to be not so much the principle of our leading Proposition, as that illustrated and acted upon in the cases of Aitcheson *v.* Mann, 9 P.R. 253, 473, (1882-3), Wilson *v.* Codyre, 26 N.B. 516, (1886), and Flick *v.* Brisbin, 26 O.R. 423, (1895), namely, that in conferring some benefit or creating some right the Dominion parliament may impose as a condition upon those who avail themselves of that benefit or that right something which it would be *ultra vires* for it to enact

Dominion power to attach conditions to rights conferred.

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So, in Doyle *v.* Bell,[1] it was held that the jurisdiction of the provincial legislatures over property and civil rights does not preclude the parliament of Canada from giving to an informer the right to recover by a civil action a penalty imposed as a punishment for bribery at an election, Patterson, J.A., observing[2] that the provision is a recognized, though not an absolutely necessary, incident of the authority to deal with the subject of elections, and referring to the decisions of the Privy Council on the British North America Act as enforcing the duty of reading that Act, and particularly sections 91 and 92, "as embodying a scheme of general legislation, and not to be construed in the narrow sense, or without reading one part of the Act or the section with another."[3]

Dominion powers over civil rights.

Again, in Ward *v.* Reed,[4] it was held by the Supreme Court of New Brunswick that the provision of 32-33 Vict., c. 31, s. 78, D., that penalties against justices of the peace for the non-return of convic-

otherwise. The first of those three cases held *intra vires*, on the above principle, section 24 of the Patent Act of 1872, 35 Vict., c. 26, D., which required holders of patents under that Act, in the event of their rights being invaded, to litigate the matter in that Court of which the place of holding should be closest to the place of residence or of business of the defendant. See per Boyd, C., at p. 254. And the other two held *intra vires* those enactments now included in sections 865 and 866 of the Criminal Code, (1892), which gives one who is assaulted the option to proceed by complaint in a summary way before a magistrate, but provides that if he elects to take his remedy by this method, and if the defendant obtains a certificate of the justice that the charge against him is dismissed, or that he has paid the penalty or suffered the imprisonment awarded, the plaintiff loses his right of action in respect of the same assault in order to recover damages as a civil wrong. See per Allen, C.J., in Wilson *v.* Codyre, 26 N.B. at p. 520.

[1] 32 C.P. 632, 11 O.A.R. 326, 3 Cart. 297, (1884).

[2] 11 O.A.R. at p. 331, 3 Cart. at p. 304.

[3] See Propositions 3, 39, and the notes thereto.

[4] 22 N.B. 279, 3 Cart. 405, (1882).

tions, etc., might be recovered by an action of debt by any person suing for the same in any Court of Record in the province in which such return ought to have been made, was *intra vires* of the Dominion parliament, because " it is a matter connected with the administration of the criminal law which belongs exclusively to the Dominion parliament, which has the right, in legislating upon a matter within its control, to give authority to the existing Courts in the province to try such matters."[1] Prop. 37

Dominion powers over civil procedure.

And it is in accordance with the leading principle under discussion that in Credit Valley R.W. Co. *v.* Great Western R.W. Co.,[2] Proudfoot, V.C., declares that in his view there can be no question that the Dominion Act, 40 Vict., c. 45, extending the provisions of the Consolidated Statutes of Canada, c. 66, s. 130, as to the crossing powers of railways to railways incorporated under provincial Acts, in any case in which it was proposed that they should cross a railway under the legislative control of Canada, was quite within the competence of the Dominion parliament, as necessary to and essential for the protection of the Dominion railways within their control. And so Killam, J., held the same thing as to a similar provision in the general Railway Act of the Dominion, 51 Vict., c. 29, in Canadian Pacific R.W. Co. *v.* Northern Pacific, etc., R.W. Co.[3] And in *Re* Canadian Pacific R.W. Co. and

Dominion laws as to railway crossings.

[1] 22 N.B. at p. 283, 3 Cart. at p. 407. And so in Clemens *v.* Bemer, 7 C.L.J. 126, (1871), Hughes, C.J., upheld the power of the Dominion parliament to legislate as to returns of convictions in criminal cases. And see Proposition 45 and the notes thereto.

[2] 25 Gr. 507, 1 Cart. 822, (1878).

[3] 5 M.R. at p. 313, (1888). And see also *In re* Portage Extension of the Red River Valley R.W., December 22nd, 1888, Cas. Sup. Ct. Dig. 487. But when, in 1888-9, the legislature of Manitoba passed an Act (52 Vict., c. 19) to provide for the crossing of one railway

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County and Township of York,[1] Rose, J., held *intra vires* and within the scope of necessary legislation the sections of the Dominion Railway Act, 1888, whereby the Railway Committee are empowered to order that gates and watchmen be provided and maintained by railways under Dominion control, under No. 10 of section 92 of the British North America Act, at crossings and highways traversing different adjacent municipalities, to decide which municipalities are interested in the crossings, and to fix the proportion of the cost to be borne by the different municipalities.

Dominion laws as to railway crossings.

A somewhat peculiar application of the principle of our Proposition may be found in Keefer *v.* Todd,[2] in which the Peace Preservation Acts, 32-33 Vict., c. 24, D., and 33 Vict., c. 27, D., being Acts for the better preservation of the peace in the vicinity of public works in which large bodies of labourers are congregated and employed, and which forbid the possession of firearms and other lethal weapons, and also the sale and possession of intoxicating liquors within the districts in which they were duly proclaimed in force, were held *intra vires* by Begbie, J., as being really laws in relation to and confined to

The Peace Preservation Acts.

by another, which provided that no railway company, whether incorporated by the Dominion parliament or otherwise, should cross, intersect, join, or unite its railway with any railway subject to the provincial legislative authority without first obtaining the approval of the Railway Committee of the Executive Council of the province as to the place and mode of crossing, etc., Sir John Thompson as Minister of Justice, by his report to the Governor-General of March 3rd, 1890, (Hodgins' Provincial Legislation, 2nd ed., at pp. 912-3), said that he entertained doubt "as to whether a provincial legislature may by legislation of this character interfere with the construction of a railway which is authorized to be built by the parliament of Canada." However, he did not recommend disallowance. See, further, as to legislative power over railways, Proposition 54, and the notes thereto, and see also p. 399, n. 1, *supra*.

[1] 27 O.R. 559, (1896).

[2] 2 B.C. (Irving) 249, (1885). See at p. 255.

the Canadian Pacific Railway, a public work within the meaning of sub-section (*a*) of No. 10 of section 92 of the British North America Act.[1] Prop. 37

A case which illustrates how difficult it may sometimes be to determine whether, in legislating upon subjects entrusted to its jurisdiction by section 91, the Dominion parliament has or has not unduly encroached upon the sphere of provincial jurisdiction is McArthur *v.* The Northern Pacific Junction R. W. Company,[2] in which case Street, J., Hagarty, C.J.O., and Osler, J.A., held that section 27 of R.S.C., c. 109, whereby all actions for indemnity for any damage or injury sustained by reason of any railway under Dominion control must be commenced within six months, was *intra vires* of the Dominion parliament, being in accordance with the customary legislation in similar cases both in Canada and England; while Burton, J.A., and Maclennan, J.A., held that it was *ultra vires*, as being an unnecessary interference with property and civil rights and with procedure in the province, the latter[3] denying that any such clause is

Difficulty of determining extent of such Dominion powers.

[1] Further citations supporting the Proposition under discussion are as follows:—Per Allen, C.J., in Robertson *v.* Steadman, 3 Pugs. at p. 631, (1876); per Palmer, J., in the Queen *v.* City of Fredericton, 3 P. & B. at p. 150, *et seq.*, (1879), as to criminal law interfering with property and civil rights, and as to these latter terms referring to civil or municipal as distinguished from criminal law; also S.C. at pp. 146-7; per Taschereau, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 558, 2 Cart. at p. 52, (1880); Beausoleil *v.* Frigon, 1 Dor. Q.B.Qu. 70, (1880); per Fournier, J., in Citizens Insurance Co. *v.* Parsons, 4 S.C.R. at p. 257, 1 Cart. at p. 303, (1880); per Ritchie, C.J., in the Queen *v.* Robertson, 6 S.C.R. at pp. 100-1, 2 Cart. at p. 82, (1882); per Gwynne, J., in Attorney-General *v.* Mercer, 5 S.C.R. at p. 703, 3 Cart. at p. 78, (1881); per Spragge, C., in Hodge *v.* The Queen, 7 O.A.R. at pp. 252-3, 3 Cart. at pp. 167-8, (1882); per Weatherbe, J., in *In re* Windsor and Annapolis R.W., 4 R. & G. at p. 321, 3 Cart. at p. 399, (1883); Smith *v.* Merchants Bank, 28 Gr. 629, 8 O.A.R. 15, 1 Cart. 828, (1883); *Ex parte* Wilson, 25 N.B. 209, (1885), as to the regulation of fisheries interfering with civil rights in the province.

[2] 15 O.R. 723, 17 O.A.R. 86, 4 Cart. 559, (1888-90).

[3] 17 O.A.R. at p. 127, 4 Cart. at p. 576.

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to be found in the railway legislation of either England or the United States. In the New Brunswick case, however, of Levesque *v.* New Brunswick R.W. Co.[1] the Supreme Court of that province also held the same section to be *intra vires* in prescribing the limitation. King, J., however (at p. 604), expresses a doubt whether that part of it which authorizes the railway company, in an action for damages, to plead the general issue and give the special matter in evidence is also *intra vires*, but Allen, C.J., (at p. 613), holds both matters alike to be incident to the right of the Dominion parliament to legislate on the subject of railways.

Limitation of actions against railways.

And when it is sought to find some rule regulating the power of the Federal parliament thus incidentally to deal with matters which are under the jurisdiction of the provinces, it does not appear that any has been, or, it may be, can be, formulated beyond this, that such power does not extend any further than is reasonable and necessary to enable it to legislate on the general subjects committed to its jurisdiction by the British North America Act.[2] And as Palmer, J., says in *In re* DeVeber[3]:—"Perhaps the Act can present no more difficult subject for construction than where to draw this line of necessity. Lawyers attempting this must always be met with the difficulty that they are, to some extent, allowing the Dominion parliament to exercise legis-

The rule of necessity.

[1] 29 N.B. 588, (1889).

[2] And so per Armstrong *v.* McCutchin, 2 Pugs. at pp. 383-4, 2 Cart. at p. 497, (1874); per Ritchie, C.J., in Valin *v.* Langlois, 3 S.C.R. at p. 16, 1 Cart. at p. 172, (1879), and in Citizens Insurance Co. *v.* Parsons, 4 S.C.R. at pp. 242-3, 1 Cart. at p. 292, (1880); per Fournier, J., S.C., 4 S.C.R. at p. 272, 1 Cart. at p. 303; per Ritchie, C.J., in Queen *v.* Robertson, 6 S.C.R. at p. 111, 2 Cart. at 82, (1882).

[3] 21 N.B. at p. 425, 2 Cart. at p. 556, (1882).

lative powers that are, by the express words of the Act, not only given to another legislative body, but given to it exclusively." And the same learned judge says in like manner in Attorney-General of Canada *v.* Foster,[1] referring to the same point:— "Where that line of necessity is to be drawn in each particular case is the great difficulty that lawyers have to contend with when expounding our constitution. It must, I think, be determined by a consideration of the general scope of the legislation called in question. There must be proper and reasonable limitation of its encroachments upon subjects that are exclusively within the power of the other legislature"[2] And again the same learned judge says in Phair *v.* Venning[3]:—"It is obvious that this line of necessity must be drawn somewhere, and where drawn in each particular case must depend upon sound construction with reference to each particular case as it arises."

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Difficulty of application of it.

The line was drawn in the case of McClanaghan *v.* St. Ann's Mutual Building Society.[4] There the

[1] 31 N.B. at p. 164, (1892).

[2] See this case also referred to *supra* pp. 281-2. Palmer, J., held, contrary to the opinion of the majority of the Court, that the Act in question in it was *ultra vires*, for that although Parliament has power to raise money by any mode or system of taxation, they only have the right to interfere with property and civil rights so far as such interference may be necessary for the purpose of effectually exercising that power, and that the Act was not at all necessary to the due and fair exercise of that power. "Suppose," he says, at p. 165, "in this case, instead of creating this additional debt upon the former owner of the property that had once been imported into this country, Parliament had confiscated the whole of it, or, further still, if it had declared all such property confiscated, it is obvious, I think, that the exercise of such a power would not be necessary to reasonably and properly exercise the the power conferred upon it of raising a revenue by taxation, for if such a right existed it would be entirely destructive of the civil rights and property of the country." See further as to powers of taxation the notes to Proposition 66, *infra*.

[3] 22 N.B. at p. 371, (1882).

[4] 24 L.C.J. 162, 2 Cart. 237, (1880).

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Quebec Court of Queen's Bench (Appeal side) held the Act 42 Vict., c. 48, D., to be *ultra vires*. This Act was entitled 'An Act to provide for the liquidation of the affairs of building societies in the Province of Quebec,' and after reciting that "whereas a large number of persons of limited means have invested their earnings in building societies in the Province of Quebec, and on account of the long period of depression such persons are exposed to lose their earnings for want of means to continue the payment of their contributions, and it is expedient to come to their relief by providing a speedy and inexpensive mode of liquidating the affairs of such societies in the said province," enacted that liquidation might be resolved upon at any general meeting, after notice, and made other necessary provisions for the liquidation of such societies, whether insolvent or not. In giving judgment Dorion, C.J., said:—"This Act is not in the nature of an insolvent law, for it is intended to apply to all building societies, whether insolvent or not. It is therefore essentially an Act affecting civil rights. . . The case of L'Union St. Jacques de Montreal *v.* Belisle[1] is in point."

Transgression of reasonable limits by Dominion Act.

Whether the last mentioned case be rightly decided or not it would seem that, in applying the rule in question, it will not be proper to press the meaning of the word 'necessary' too far. Thus in Doyle *v.* Bell,[2] in which the constitutionality of the Dominion Elections Act, 1874, was in question in so far as it gave to an informer the right to recover by a civil action a penalty imposed as a punishment for bribery at an election, and in which it was contended by counsel opposed to the Act that, granting the

[1] L.R. 6 P.C. 31, 1 Cart. 63.

[2] 32 C.P. 632, 11 O.A.R. 326, 3 Cart. 297, (1884).

right of Parliament to make all necessary provisions to enforce purity of election, they could fully effect such purpose by means of the criminal law, and that, therefore, there was no reason for their conferring the power to sue, Hagarty, C.J.O., says[1]: —"I think their right to do as they have done here cannot be measured by our view of the necessity of such a proceeding"; while Rose, J., observed[2]: —"I do not understand by the use of the word 'necessary,' as found in various decisions and text-books, that it is meant to lay down the doctrine that to bring within the powers of the Dominion legislature any provision of an enactment respecting a subject within the exclusive jurisdiction of such legislature, and which provision might affect civil rights, it must necessarily appear that without such provision it would be impossible to carry into effect the intentions of the legislature, or that probably no other provision would be adequate. On the contrary, it seems to me that if such provision might, under certain circumstances, be beneficial and assist to more fully enforce such legislation, then it must, at all events, on an appeal to the Courts, be held to be necessary, that is, necessary in certain events. Surely the legislature must be allowed some, and, in my opinion, a very wide, discretion as to the mode of enforcing its own enactments. It cannot be said that the Courts are to sit in judgment on the exercise of such discretion, and dictate to the legislature whether they shall adopt this or that mode, because in the opinion of the Courts one mode is more convenient or better, or at least as well adapted to effect the purpose of the legislature."[3]

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Rule of necessity must not be pressed too far.

Legislative discretion.

[1] 11 O.A.R. at p. 328, 3 Cart. at p. 300.

[2] 11 O.A.R. at p. 335, 3 Cart. at pp. 308-9.

[3] And see per Rose, J., in the recent case of *Re* Canadian Pacific R.W. Co. and County and Township of York, 27 O.R. at p. 567, (1896).

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In the Queen *v.* Robertson,[1] Fournier, J., says, referring to this matter :—"Basing my opinion on that of the highest judicial authorities of the United States, who have been called on to decide analogous questions as to the jurisdiction and the respective rights of the States and of the federal gov-

And so Story, in his work on the Constitution of the United States, 5th ed., Vol. 2, at p. 143, discussing the clause in the constitution, article 1, section 8, (18), which gives power to Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any department or officer thereof," observes :—"The relation between the measure and the end, between the nature of the means employed towards the execution of a power and the object of that power, must be the criterion of constitutionality ; and not the greater or less of necessity or expediency. If the legislature possesses a right of choice as to means, who can limit that choice ? Who is appointed an umpire or arbiter in cases where a discretion is confided to a government ? The very idea of such a controlling authority in the exercise of its power is a virtual denial of the supremacy of the government in regard to its powers. It repeals the supremacy of the national government proclaimed in the constitution." And again, (*ib.* at p. 147) :—"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to the end, and which are not prohibited, but are consistent with the letter and spirit of the instrument," (*sc.*, the constitution), "are constitutional." At Vol. 2, p. 137, Story says the above clause in the American constitution is "only declaratory of a truth, which would have resulted by necessity and unavoidable implication from the very act of establishing the national government, and vesting it with certain powers." See, also, *ib.*, at p. 143 ; per Spragge, C., in Regina *v.* Hodge, 7 O.A.R. at pp. 252-3, 3 Cart. at p. 168 ; Bryce's American Commonwealth, (2 Vol. ed.), Vol. 1, pp. 321, n. 4, 369-70. It may be here mentioned that there is a very different class of case in which the rule of necessity is to be applied in connection with the law of legislative power, namely, in determining what powers provincial legislatures must be held to possess as necessarily incident to their character as legislative bodies, apart from their power to legislate on subjects assigned to them by section 92 of the British North America Act. Here it would seem that the assumption of power constructively on the ground of necessity must be restrained to its narrowest limits : per Ramsay, J., in *Ex parte* Dansereau, 19 L.C.J. at p. 226, 2 Cart. at p. 180, (1875); and, also, in Cotte's case, 19 L.C.J. at p. 217, 2 Cart. at p. 225, (1875), where he says that necessity, to be the groundwork of a power of this sort, must be an absolute necessity. On the other hand, in *Ex parte* Dansereau, 19 L.C.J. at p. 243, 2 Cart. at p. 211, Monck, J., speaks of 'necessity' and 'convenience' as "pretty much the same thing in matters of this kind." See, however, on the subject of such implied powers of the legislature the notes to Proposition 66, *infra ;* and, also, *supra* pp. 63-9.

Story on the rule of necessity.

Powers necessarily incident to legislative bodies.

[1] 6 S.C.R. at p. 139, 2 Cart. at p. 112, (1882).

ernment of the American Union, I have adopted from the outset their opinion, that it was not possible to establish a uniform rule of interpretation which would serve for the decision of all conflicting questions of this kind. This opinion has been also expressed several times by Her Majesty's Privy Council : Cushing *v.* Dupuy, 5 App. Cas. 409, at p. 415[1]; Parsons *v.* Citizens Insurance Company, 7 App. Cas. 96."[2]

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Impossible to define exact limits of powers by implication.

Now, what is thus stated by Fournier, J., is not laid down in so many words in Cushing *v.* Dupuy, but, no doubt, what he is referring to is the passage from that judgment already quoted in the notes to this proposition,[3] while, in respect to Citizens Insurance Company *v.* Parsons, he would seem to be referring to the following passage in their lordships' judgment, and especially to the concluding words :—

"With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of those subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limit of their respective powers. It could not have been the intention that a conflict should exist ; and in order

Citizens' Insurance Co. *v.* Parsons.

[1] 1 Cart. 252, at p. 258.

[2] 1 Cart. 265. It, of course, must be remembered that if the Dominion parliament or a provincial legislature legislates strictly within the powers conferred, in relation to matters over which the British North America Act gives it exclusive legislative control, we have no right to enquire what motive induced it to exercise its powers. See Proposition 20 and the notes thereto.

[3] See *supra* pp. 425-7.

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to prevent such a result the language of the two sections must be read together, and that of one interpreted and, where necessary, modified by that of the other."[1] Their lordships seem to be here referring only to the first class of cases above distinguished,[2] namely, where the question is really one of defining what is and what is not included in the enumerated classes of subjects in sections 91 and 92 respectively.

Applicability of Proposition 37 to provincial legislatures.

Proceeding to consider how far our leading Proposition is applicable *mutatis mutandis* to the provincial legislatures, the first consideration which presents itself is that they have not the advantage of the strong position in which the Dominion parliament is placed by the *non obstante* clause in section 91 above referred to, nor of the concluding clause of that section,[3] nor does there seem to be any authority to support the view that provincial legislatures can at all legislate upon any of the enumerated classes of subjects in section 91, properly understood, by way of provisions ancillary to their own Acts.[4] Mr. Todd, indeed, in his Parliamentary Government in the British Colonies,[5] after noting the principle of the leading Proposition under discussion in its application to the Dominion parliament, says: — "The converse of this principle has also been maintained by the Courts in respect to local legislation upon assigned topics, which may appear to trench upon prescribed Dominion juris-

[1] 7 App. Cas. at pp. 108-9, 1 Cart. at p. 273, (1881).

[2] See *supra* at pp. 431-2.

[3] See pp. 427-9, and p. 430, n. 4, *supra*.

[4] In *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 258, (1895), King, J., observes that while provincial legislatures have "what is reasonably and practically necessary for the efficient exercise of" their enumerated powers, this is so, "subject to the provisions of section 91."

[5] 2nd ed. at p. 436.

diction." But he does not cite any cases, and what judicial authority there is, with the exception of one case presently to be noticed, does not seem to carry the matter further than this, that whatever powers the provincial legislatures have as included, *ex vi termini*, within the enumerated classes in section 92 when properly understood, those powers they may exercise, although in so doing they may incidentally touch or affect something which might otherwise be held to come within the exclusive jurisdiction of the Dominion parliament under some of the enumerated classes in section 91.

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They may exercise their assigned powers,

Though in so doing they incidentally affect trade.

Thus in Bennett *v.* The Pharmaceutical Association of the Province of Quebec[1] it was held by the Quebec Court of Queen's Bench (Appeal side) that the Quebec Pharmacy Act of 1875, so far as it required certain qualifications on the part of the persons exercising the business of selling drugs and medicines, was valid, though it might incidentally interfere in some degree with the sale of drugs and of medicines in the province. In delivering judgment Dorion, C.J., no doubt expresses himself in vague and broad terms in stating[2] that the Court considered it a proper rule of interpretation that the powers given to Parliament or the provincial legislature to legislate on certain subjects included "all the incidental subjects of legislation which are necessary to carry on the object which the British North America Act declared should be carried on by that legislature." But he goes on to explain his meaning thus:—"The determining of the age, or other qualifications required by those residing in the province of Quebec to manage their own business,

[1] 1 Dor. Q. A. 336, 2 Cart. 250, (1881).

[2] 1 Dor. Q. A. at p. 340, 2 Cart. at p. 255.

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or to exercise certain professions or certain branches of business attended with danger or risk for the public, are local subjects in the nature of internal police regulation; and in passing laws upon those subjects, even if those laws incidentally affect trade and commerce, it must be held that this incidental power is included in the right to deal with the subjects specially placed under their control, the exercise of which cannot be considered to be unconstitutional.[1]

Thus they may enforce license laws by penalties.

Similarly in *Ex parte* Laveillé,[2] where the right of a provincial legislature to impose penalties for violating its laws in relation to licenses was disputed upon the ground that this was interfering with trade and commerce, Mackay, J., says that clearly the right to levy taxes on shops, etc., towards raising a revenue for provincial purposes, has been conceded to the provincial legislatures by section 92, "and all that is necessary to enable the power to be exercised with effect must be held to have been conceded. Quebec province would in vain tax shops and taverns, unless sales otherwise than under license could be ordered by it to expose to penalties." And so per Ritchie, E.J., in Keefe *v.* McLennan,[3] a local legislature is not debarred from making laws regulating the sale of intoxicating liquors, "because it indirectly and to a limited extent affects one of the subjects over which the Dominion has power of legislation."

[1] So, also, in Regina *v.* Mohr, 7 Q.L.R. at p. 191, 2 Cart. at p. 268, (1881), Cross, J., says that perhaps "when it is found that the main object of a law is clearly within the power of the legislature that enacted it, what it contains as mere incidents, if essential to its operation, should not be readily treated as *ultra vires*, although such provisions may seem to invade the powers of the other legislature, unless clearly in opposition to the letter of the statute."

[2] 2 Steph. Dig. at p. 446, 2 Cart. at p. 350, (1877).

[3] 2 R. & C. at p. 11, 2 Cart. at p. 408, (1876).

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It must be remembered, as suggested by the passage from the judgment of Allen, C.J., in The Queen *v.* The City of Fredericton, cited in the notes to the last Proposition,[1] that the mere fact that an Act of a provincial legislature may incidentally touch some of the classes of subjects enumerated in section 91, although, in fact, such subjects are foreign to the purposes of such Act, and not necessarily and directly involved in the legislation, does not make the Act really one within or upon that class of subjects. And so when the Minister of Justice took objection to s. 23 of the Ontario Act, 51 Vict., c. 70, providing that the railway company therein incorporated might become parties to promissory notes and bills of exchange, and how such notes and bills might be made, accepted, or endorsed so as to be binding on the company, as an infringement on the Dominion power, under No. 18 of section 91, over 'bills of exchange and promissory notes,' Mr. Mowat, the provincial Attorney-General, replied that the Dominion power is "not incompatible with the right of the provincial legislature to confer authority on a corporation to become a party to instruments of this nature as a matter incidental to such corporation.[2] The object of the legislation is not to alter

Provinces may incidentally touch Dominion subjects.

But may not legislate upon them.

[1] See *supra* p. 424.

[2] In *In re* The Dominion Provident Benevolent and Endowment Association, 25 O.R. at p. 620, Armour, C.J., in the course of the argument, remarked :—"If the local legislature has power to incorporate the Association, it has power to say what are the rights of the parties under the incorporation"; and, again, at p. 621, he says :—"If that legislature has power to incorporate, it has power to deal with rights acquired under the incorporation." The question involved in that case was, as to the power of the provincial legislature to confer upon the Master in Ordinary the powers it assumed to confer upon him by the Ontario Insurance Corporations Act, 1892, and what was the jurisdiction of the Master under the powers so conferred. This Act, 55 Vict., c. 39, by 56 (2), provides for the appointment of a receiver, after cancellation of a corporation's registry under the Act, and enacts that the Master "shall settle schedules of creditors and contributories, direct the realization of assets, the discharge of liabilities, and the dis-

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or interfere with the general law in respect to those subjects, but to invest the company with the powers necessary for its due working," and he refers to the

tribution of the surplus, . . and generally shall have all the powers which might be exercised on any reference to him under a judgment or order of the High Court." And with a view to a clearer understanding of the above somewhat far-reaching *dicta*, the following memorandum has been obtained from Mr. J. M. Clark, who was of counsel in the case:—"The Chief Justice conveyed the impression, and I have no doubt intended to convey the impression, that the Ontario legislature, having power to create the corporation there in question, had power to provide for the rights which would arise as incident to such corporation, and also to provide for the dissolution of the corporation, and the results consequent thereupon. The circumstances under which the words of the Chief Justice were spoken clearly indicated that this principle led to the conclusion that the Ontario legislature, having power to legislate respecting insurance and insurance corporations, had also power to provide for their dissolution and the rights consequent thereupon, and for the judicial settlement of such rights and consequences. It will be seen that this is carrying the principle exceedingly far, but the Chief Justice intimated that such was his view of the decisions, and that in this case the Ontario legislature, having the power to incorporate the Dominion Provident Association, could not only provide for its dissolution, but also appoint and constitute a tribunal which should determine such rights. Though it seems idle to question the Chief Justice's reasoning now, still one cannot help observing that, if this reasoning is correct, the provision of the British North America Act giving the provincial legislature power to deal, for instance, with property and civil rights in the province, would give the provincial legislature power to provide for the determination of the rights respecting civil property, and to appoint special judicial officers to make such determination. The question of the Ontario legislature providing for the dissolution of a corporation created by it by a compulsory process upon insolvency, was not discussed or referred to in the argument before the learned Chief Justice, and, therefore, what he said could have no special relation to such a point. It is, however, to be borne in mind that the dissolution or winding up under the Insurance Corporations Act of 1892 may take place upon the registrar finding a Society, etc., to be insolvent, and the Act specially provides for a statement of the financial condition and affairs of the Society for the purposes of the Act, and, consequently, although this point was not in issue before the learned Chief Justice, it is clear that it is proposed to provide under the Act of 1892 for the dissolution of the Society upon insolvency, and, if the Act is valid, it would involve the right of the Ontario legislature to cancel registration of the corporation under that Act, and the cancellation of the certificate involves the right of the legislature to provide for the winding up of the corporation." Cf. per Robertson, J., in *Re* Iron Clay Brick Manufacturing Co., 19 O.R. at pp. 119-20, who held that the Ontario Joint Stock Companies Winding-up Act, R.S.O., 1887, c. 183, had no application in a case where a winding up was sought by a creditor on the grounds that the company was insolvent, the provincial legislature having no jurisdiction in matters of insolvency. See also pp. 387-8, and 443,n. 2 *supra*. See, further, Crowe *v.* McCurdy, 18 N.S. 301, at pp. 302-3.

Provincial legislatures may determine the rights of parties under their own charters of incorporation.

fact that legislation of this nature has for twenty years passed unchallenged as entitled to weight as showing that it is *intra vires*.[1] Prop. 37

In much the same way, and in the same report, the Minister of Justice objected to section 12 of the same Ontario Act, which provided that aliens as well as British subjects, and whether resident in the province or elsewhere, might be shareholders in the company, and that all such shareholders should be entitled to vote on their shares and be eligible to office as directors, on the ground that this was an infringement on the exclusive Dominion power to make laws in respect to aliens under No. 25 of section 91 of the British North America Act, and Mr. Mowat contended, in answer, that this power was not intended to give and did not give Parliament jurisdiction in respect to such matters as that in question, which he submitted related not to naturalization and aliens within the meaning of the British North America Act, but to property and civil rights. This view, he said, is in accordance with the observation of Mr. Todd in his Parliamentary Government in the British Colonies, (1st ed., at p. 218).[2] Nevertheless, in a report so recent as November 2nd, 1895,[3] Sir C. H. Tupper, as Minister of Justice, referring to certain Ontario Acts of 1895, repeats the same objections, expressing the view that it is beyond the authority of a provincial legislature to

Thus they may provide that aliens may be shareholders in provincial companies.

No. 25 of sect. 91, B.N.A. Act.

[1] Hodgins' Provincial Legislation, 2nd ed., at pp. 212-4.

[2] What Mr. Todd says (2nd ed., at p. 299) is that it has been assumed by the Ontario and Manitoba legislatures that provincial legislatures only are competent to authorize aliens to hold and transmit real estate under property and civil rights in the province in No. 13 of section 92. He adds:—"But the 4th section of the Dominion Act of 1881 expressly declares that 'real and personal property of every description may be taken, acquired, held, and disposed of by an alien' in Canada, subject to certain restrictions therein stated, it being understood that the concurrent rights of legislation in the several provinces are not thereby infringed."

[3] Hodgins' Provincial Legislation, 2nd ed., at p. 244 *b*.

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legislate so as to affect the rights of aliens. He, however, recommends that the matter be left to the Courts. And in the report of May 30th, 1892,[1] on an Act of New Brunswick to enable aliens to acquire, hold, and convey real estate in the province, Sir John Thompson, as Minister of Justice, says that, in his view, "it is very questionable whether the rights purporting to be created by this Act can be obtained by the legislation of a provincial legislature"; but he recommends that the Act be left to its operation.[2]

Legislation as to aliens.

And in connection with the above may be mentioned the view expressed by Bain, J., in Schultz *v.* The City of Winnipeg,[3] that in giving provincial legislatures exclusive powers to make laws in relation to municipal institutions, power was, of course, given to make all such laws as would be reasonably necessary to establish, carry on, and work such institutions, even if such laws encroach upon some of the subjects that are reserved for the exclusive jurisdiction of the parliament of Canada.

Municipal institutions.

[1] *Ibid.* at p. 755.

[2] While referring to aliens, it may be mentioned that in his report of March 21st, 1891, on the British Columbia Acts of 1890, (*ibid.* at p. 1121), Sir John Thompson, as Minister of Justice, objects to No. 20, being an Act incorporating a certain company, and which, by section 27, forbade under penalties the employment of Chinese, that such provision "seems open to question on the ground that it is for the parliament of Canada to legislate respecting aliens, and therefore to prescribe their rights and disabilities." And in another report of January 27th, 1894, (*ibid.* at pp. 634-5), on a certain Nova Scotia enactment relating to the immigration of paupers, he expresses an opinion that it is *ultra vires* of a provincial legislature to pass an Act relating to immigration, Parliament having passed statutes in that regard. On the general subject of naturalization of aliens, see Todd's Parliamentary Government in the British Colonies, 2nd ed. at p. 293, *et seq.*

Aliens and immigration.

[3] 6 M.R. at p. 57, (1889). Cf. per Ritchie, C.J., in Lynch *v.* The Canada North-West Land Co., 19 S.C.R. at pp. 210-3, (1891), quoted *supra* at pp. 421-2. And see *supra* p. 398, n. 1.

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As Crease, J., says in Regina *v.* Wing Chong,[1] it does not follow because a local Act touches on subjects committed to the jurisdiction of the Dominion parliament by section 91, that it therefore interferes with them so as to render it unconstitutional; and it would seem, as already stated, that none of the above authorities carry the matter beyond that of definition of the meanings of the various enumerated classes in sections 91 and 92 of the British North America Act, conceding to provincial legislatures the power to legislate to the full extent upon the subjects committed to them, though in so doing they may incidentally touch what may be called the fringe of Dominion subjects. One case, however, as has been stated,[2] seems to carry the matter somewhat further, namely, Jones *v.* The Canada Central R.W. Co.,[3] where Osler, J., held that though a debenture bond of an Ontario railway company might, when the holder resided in England, be properly held to be a debt domiciled out of the province, and so not within the provincial jurisdiction to affect under No. 13 of section 92, 'property and civil rights in the province,'[4] yet that the company in question, being a local work or undertaking within the meaning of No. 10 of section 92, such provincial legislature had jurisdiction to legislate in respect to such a debt in carrying out by statute a scheme for the financial reorganization of the company, and that its powers were not paralyzed merely because some or all of the debts payable were payable to creditors resident outside the province, and therefore not property or

Provinces can never invade the specific Dominion area.

Jones *v.* Canada Central R.W. Co.

[1] 2 B.C. (Irving) at p. 158, (1885).

[2] *Supra* at p. 455.

[3] 46 U.C.R. 250, 1 Cart. 777, (1881).

[4] See Proposition 68, and the notes thereto.

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civil rights in the province. He says,[1] somewhat vaguely :—"It is well settled that the Dominion parliament may legislate with respect to property and civil rights within the province where it becomes necessary to do so for the purpose of legislating generally and effectually in relation to matters exclusively within their own legislative authority. If the powers conferred upon the provincial legislatures are to be effectually exercised, they must, I think, receive a not less liberal construction." But it is to be observed that to make laws in relation to debenture bonds of provincial railway companies which are held and owned abroad does not, as it would seem, come under any of the enumerated classes of Dominion subjects in section 91, but would, no doubt, be within the power of the Dominion parliament, under its general residuary power of legislation[2]; but, so far from this residuary power of legislation residing in the Dominion, "notwithstanding anything assigned to the provinces,"[3] it will be remembered that exactly the reverse is the case, namely, that that power is given only in relation to matters not coming within the classes of subjects assigned exclusively to the provinces ; and, therefore, the provinces might be held to have power incidentally to invade this area, without having any such power to invade the area of any of the enumerated Dominion subjects; and, as already stated, there seems no authority going so far as to give the provinces the right actually to invade Dominion territory comprised in the enumerated subjects for the

Provinces may incidentally invade the general Dominion area.

[1] 46 U.C.R. at p. 260, 1 Cart. at p. 787. Cf. per Savary, Co.J., in *In re* Killam, 14 C.L.J., N.S., at p. 242.

[2] See Proposition 26 and the notes thereto.

[3] See *supra* at pp. 427-9.

purpose of provisions ancillary to one of their own Acts. Prop. 37

There is, however, a class of decisions which at first sight might seem to carry the matter as far even as this, namely, those in which it has been held that provincial legislatures have power to regulate procedure affecting the penal laws which they have authority to enact under No. 15 of section 92[1] of the British North America Act, notwithstanding that procedure in criminal matters is, by No. 27 of section 91, assigned exclusively to the Dominion parliament.[2] And so Hagarty, C.J.O., in Regina *v.* Wason,[3] who, after citing Cushing *v.* Dupuy,[4] says:—"I think we can well keep the two jurisdictions distinct, and as to each adhere to the rule

They may regulate the procedure under their own penal laws.

[1] In Regina *v.* Frawley, 7 O.A.R. at p. 269, 2 Cart. at pp. 590-1, (1882), Spragge, C., upholds the contention that provincial legislatures would have had this power, even without No. 15 of section 92 as incident to their constitution. And Dugas, J., in Regina *v.* Harper, 1 R.J.Q., S.C., at p. 333, (1892), referring to No. 15 of section 92, says that "the same power exists for the other laws which come within their," (*sc.* the local legislatures), "jurisdiction under the other parts of the constitution, notwithstanding the fact that nothing is said about it." And as to the implied powers of Congress to declare acts of disobedience to its measures to be crimes, and to affix punishments, though possessing no such general jurisdiction over criminal law as the Dominion parliament has, see per Osler, J.A., in Regina *v.* Watson, 17 O.A.R. at p. 243, 4 Cart. at p. 602. As to provincial power to impose forfeiture of goods as punishment under No. 15 of section 92, if not under No. 13, (notwithstanding some remarks of Sir Barnes Peacock in the course of the argument *In re* The Dominion License Acts 1883-4, pp. 141-2, indicating a view the other way), see King *v.* Gardner, 25 N.S. at pp. 52-4. And as to Dominion power to impose forfeiture as punishment, *e.g.*, the forfeiture of money found in a common gaming house, see O'Neil *v.* Tupper, 4 R.J.Q. (Q.B.) 315, 26 S.C.R. at p. 132, (1896).

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[2] Such decisions are the Quebec cases of Pope *v.* Griffith, 16 L.C.J. 169, 2 Cart. 291, (1872), *Ex parte* Duncan, 16 L.C.J. 188, 2 Cart. 297, (1872), Page *v.* Griffith, 17 L.C.J. 302, 2 Cart. 308, (1873), Coté *v.* Chauveau, 7 Q.L.R. 258, 2 Cart. 311, (1880); and others are referred to in the text.

[3] 17 O.A.R. at p. 232, 4 Cart. at p. 590, (1890). The Supreme Court of Nova Scotia followed Regina *v.* Wason in this respect in The Queen *v.* Ronan, 23 N.S. at pp. 426, 459, (1891).

[4] 5 App. Cas. 409, 1 Cart. 252, (1880).

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that where either has the right to legislate on a named subject, it must by necessary implication be held that all powers are given fully to carry out the object of the enactment, although subjects such as civil rights and procedure, civil or criminal, may be apparently interfered with. The exclusive right to deal with the specific subjects remains wholly unaffected,—the carrying the legislation into practical effect and providing necessary penalties for its observance is alone in question."[1]

Provincial penal procedure.

[1]And so per Maclennan, J.A., S.C. 17 O.A.R. at p. 251, 4 Cart. at pp. 611-2. And Hagarty, C.J.O., declares again that he adheres fully to the rule thus expressed in the subsequent case of Attorney-General of Canada *v.* Attorney-General of Ontario, 19 O.A.R. at p. 35, (1892). See, also, on the same point, Regina *v.* Frawley, 7 O.A.R. at p. 269, *et seq.*, 2 Cart. at p. 590, *et seq.*; per Savary, Co.J., in *In re* Killam, 14 C.L.J., N.S., at p. 242, (1878). In Regina *v.* Bittle, 21 O.R. 605, (1892), where many of the cases and *dicta* referred to in the text were cited, it was held *ultra vires* of the Dominion parliament to enact, as they had done by R.S.C., c. 106, ss. 114, 120, that on the trial of any proceeding, matter, or question under any Act in force in any province respecting the issue of licenses for the sale of spirituous liquors, the defendant should be competent to give evidence ; and in a proceeding under the Ontario Liquor License Act, R.S.O., c. 194, the defendant was held not to be a competent witness. It seems, however, somewhat strange that R.S.O., c. 61, s. 9, was held not to apply, on the ground that that only made the defendant a competent witness on the trial of any matter 'not being a crime.' This would appear however, to be in accordance with the view taken in another recent case of Regina *v.* Hart, 20 O.R. 611, (1891), that an offence under a provincial penal Act, though certainly it is not a crime within the meaning of No. 27 of section 91 of the British North America Act, (see *supra* p. 36-7, 49-51), is to be considered a crime for the purpose of the interpretation of such provisions in statutes as the Ontario one just referred to. And so in Regina *v.* Hart it was held that, notwithstanding R.S.O., c. 61, s. 9, the defendant was not either a competent or compellable witness on the trial of an offence against a city by-law in the erection of a wooden building within the fire limits. See per Rose, J., 20 O.R. at pp. 612-4. In the latter place he says :—"It may well be that the provincial legislature has power to pass an enactment and affix certain sanctions, and that an offence against such an Act would be a crime punishable under the provisions of a provincial criminal law." And see Regina *v.* Becker, 20 O.R. 676 ; Regina *v.* Rowe, 12 C.L.T. 95. And in this case of Regina *v.* Bittle, (at p. 612), McMahon, J., seems to imply that if the Canada Temperance Act had made an offence under the Ontario License Law a crime, then the procedure respecting the admissibility of the evidence of a defendant would be controlled by section 114 above referred to. With deference, however, it is submitted that what procedure governed would depend upon whether the charge was laid under the Dominion

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But it is submitted that, as held in the Quebec decisions above noted, as an offence against a provincial Act such as is referred to is not a 'crime' at all within the proper meaning of No. 27 of section 91 of the British North America Act, neither is the procedure in question 'criminal procedure' within the meaning of that clause.[1] And so Dunkin, J., in *Ex parte* Duncan,[2] says:—" Whatever infractions of law, whether as to matters of Dominion or provincial legislation, Parliament sees fit to designate as crimes, it and it alone can so declare and as such punish, and to that end regulate procedure. Whatever infractions of any provincial law coming within the purview of this 92nd section of the British North

Provincial penal procedure.

or provincial statutes, even though the Dominion parliament had made the infraction of a provincial Act a crime. As to the difficulty of drawing the line between what is within No. 27 of section 91, and what within No. 15 of section 92, see the report of the Minister of Justice of March 14th, 1895, on a Nova Scotia Act respecting the use of tobacco by minors: Hodgins' Provincial Legislation, 2nd ed. at p. 762. As to whether provincial Courts created by local legislatures can, as such, have jurisdiction to interfere with the decisions of a Dominion tribunal, such as the Minister of Agriculture in the case of patents, see In the Matter of the Bell Telephone Co., 9 O.R. 339, at p. 346, (1885). As to the Courts not enforcing an *ultra vires* order of such a tribunal, see *Re* Canadian Pacific R.W. Co. and County and Township of York, 27 O.R. at p. 570.

[1] As to what is 'procedure in criminal matters,' under No. 27 of section 91, as distinguished from the 'constitution, maintenance, and organization of provincial Courts of criminal jurisdiction,' under No. 14 of section 92, see Regina *v.* O'Rourke, 1 O.R. 464, 2 Cart. 644; Regina *v.* Provost, M.L.R. 1 Q.B. 477, 29 L.C.J. 253; Regina *v.* Levinger, 22 O.R. 690; Regina *v.* Toland, 22 O.R. 505; Sproule *v.* Reginam, 2 B.C. (Irving) 219. Reference may also be made to an article on Criminal law and the British North America Act, 29 C.L.J. 240, as to which, however, the principle contained in our leading Proposition seems to justify the Dominion legislation, which, the writer suggests, must be *ultra vires*. See, also, Clement's Law of the Canadian Constitution, at pp. 235-6. By Order in Council of April 19th, 1888, a British Columbia Act, (c. 7 of the Acts of 1887, being an Act to establish a Court of Appeal from the summary decisions of magistrates), which gave a right of appeal to a judge of the Supreme Court of British Columbia from any conviction made under a statute of Canada, was disallowed as legislation affecting procedure in criminal matters: Hodgins' *ibid.* at p. 1108.

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[2] 16 L.C.J. at p. 191, 2 Cart. at p. 301, (1872).

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America Act Parliament may not see fit thus to deal with, the interested province may punish by fine penalty or imprisonment; but its so doing does not make the offence to be thus punished a crime, nor the procedure laid down in order to its punishment procedure in a criminal matter. On the contrary, such whole matter must remain a civil matter within what is here the true meaning of these respective terms."[1]

Provincial penal procedure.

And if the view of the law above expressed is correct, it would seem that the decision of Harrison, C.J., in

[1]See, too, per Ramsay, J., in Pope *v.* Griffith, 16 L.C.J. at p. 171, 2 Cart. at p. 296, (1872). And see Regina *v.* Boardman, 30 U.C.R. 553, (1871), esp. at p. 556. The above words of Dunkin, J., seem to imply that the Dominion parliament, having once legislated in respect to the Acts in question, the provincial legislature can no longer legislate in regard to them. And see the report of Sir J. Macdonald, as Minister of Justice, of November 4th, 1869, to the same effect: Hodgins' *ibid.* at p. 484. See, however, *supra* pp. 51, n. 1, 412-4. In the argument in Russell *v.* The Queen, in 1882, (2nd day at p. 102; see *supra* p. 398, n. 1), Sir James Hannen says :—"If you have got a thing clearly,—I will not stop to consider what would be clearly,—but if you have got a thing clearly within the competency of the provincial legislature, it certainly seems to me that the Dominion parliament could not indirectly take that away from the province by making it a crime to do that which the provincial legislature had authority to say might be done." See, also, 10 C.L.T. at p. 233, *et seq.*, where the question whether Parliament can make a crime of the breach of a provincial Act is raised and somewhat discussed; and *supra* at pp. 49-50. A writer of an article on the Constitution of Canada, in 11 C.L.T. at p. 141, cites, "as illustrating the inability of the legislatures to deal with breaches of their own laws, where the offence is already known to the law as a criminal offence," Regina *v.* Lawrence, 43 U.C.R. 164, 1 Cart. 742, noted *supra* at p. 36, and followed in Regina *v.* Matheson, by Ontario Divisional Court, Sept. 15th, 1896, unreported. And in his report of January 28th, 1889, as Minister of Justice, Sir John Thompson, referring to a Nova Scotia Act, giving a town council power to make by-laws for 'the prevention and punishment of vice, drunkenness, immorality, and indecency in the public streets, highways, and other public places, and prevention of the profanation of Sunday', observes :—"These matters are within the control of the parliament of Canada, and have been legislated upon by that parliament, and it can only be competent for a provincial legislature to enact laws in respect to them for the purpose of aiding the enforcement of the laws of Canada. In any other view it would be difficult to assent to the constitutional character of the provisions mentioned": Hodgins' *ibid.* at p. 581. As to the power of the provincial legislatures to legislate in furtherance of Dominion Acts, see Proposition 47 and the notes thereto.

The Dominion jurisdiction over crimes.

Regina *v.* Roddy,[1] must be considered overruled, where he draws the curious distinction that, although a provincial law prohibiting the sale of spirituous liquors on Sunday, and punishing by fine or imprisonment, may not be a criminal law within No. 27 of section 91, but a perfectly good and valid law under No. 15 of section 92, yet the provincial legislature cannot enact that a man charged with an offence under it shall be a compellable witness, on the ground that the provincial legislatures have no power "directly or indirectly of destroying the general rules of evidence appertaining to criminal procedure, or quasi-criminal procedure throughout the Dominion, as, for example, by passing an Act subjecting a man to testify against himself in cases where the charge against him is in substance a charge of crime." They had, he held, no power "to alter well-understood rules of evidence made for the protection of persons substantially accused of crime"; and for persons authorized to sell spirituous liquor to make sale thereof on Sunday, contrary to the provisions of the provincial Act in that behalf, was a crime "in the broad sense of that word."[2] And that this is no longer law would seem to be indicated by the recent case of Weiser *v.* Heintzman (No. 2),[3] where the Dominion parliament, having provided by 56 Vict., c. 31, s. 5, that no person shall be excused from answering any question on the ground that the answer may tend to criminate him, Boyd, C., held that this enactment, "by necessary constitutional limitations, as well as by

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Provincial Acts making defendant competent witness on penal proceedings.

[1] 41 U.C.R. 291, 1 Cart. 709.

[2] 41 U.C.R. at pp. 296, 302, 1 Cart. at pp. 714, 721.

[3] 15 O.P.R. 407, (1893). Cf. Regina *v.* Bittle, 21 O.R. 605.

Prop. 37 express declaration, applies only to proceedings respecting which the parliament of Canada has jurisdiction."[1]

[1]A subsidiary question of a criminal character may arise in a civil action, as when one claimed the ownership of money found in a common gaming house, and, on the intervention of the Minister of Justice, it was set up that the money had been forfeited to the Crown under section 575 of the Criminal Code, but the ordinary rules of civil proceedure will apply, as, for example, in the matter of competency of witnesses: O'Neil *v.* Tupper, 4 R.J.Q. (Q.B.) 315, 26 S.C.R. 122, esp. at p. 132, (1896).

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38. As it was scarcely possible to make a complete enumeration of all the powers to be vested in the Dominion Parliament and Provincial Legislatures respectively, and, no doubt, to avoid grave inconveniences, use was made in drawing our Constitution, as in that of the United States, of general language, containing in principle the conferred powers, and leaving to future legislation [and judicial interpretation] the task of completing the details.

The above Proposition,—excepting the words "and judicial interpretation,"—is based on the language of Fournier, J., in Valin *v.* Langlois,[1] where he cites a passage from Kent's Commentaries on American Law,[2] summarizing the following words of Marshall, C.J., in Martin *v.* Hunter's Lessee[3]:— "The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execu-

The American constitution.

[1] 3 S.C.R. at p. 56, 1 Cart. at p. 194, (1879).

[2] 12th ed., Vol. 1, at p. 318.

[3] 1 Wheat. at pp. 326-7.

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tion. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require."[1]

The general terms used in it.

And the following words of Marshall, C.J., in M'Culloch *v.* The State of Maryland,[2] cited by Harrison, C.J., in Leprohon *v.* The City of Ottawa,[3] may also be appropriately referred to:—"A constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which

The great outlines only marked.

[1] The above words are also quoted in Story on the Constitution of the United States, (5th ed., Vol. 1, p. 323). So, also, per Burton, J.A., in Regina *v.* Hodge, 7 O.A.R. at p. 272, 3 Cart. at p. 177, (1882).

[2] 4 Wheat. 316, at p. 407.

[3] 40 U.C.R. at p. 488, 1 Cart. at p. 645, (1877).

compose those objects be deduced from the nature of the objects themselves[1]; " words which may be supplemented by those of Wilson, J., in Regina *v.* Taylor,[2] who, after observing on the impossibility of expressing the details of the respective powers of the two legislative bodies in any other way less than a code, adds:—" But the code itself would have to be supplemented from time to time, and even then, with all the elaboration it received, it would not be so convenient, or practical, or comprehensive, or useful to all purposes, as a simple enumeration of the rights and powers intended to be exercised under the general terms by which they are commonly known, and which are quite as well understood as, and perhaps better than, they could be if it were attempted especially to define them."

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General terms preferable,

And so Crease, J., observes in the Thrasher Case[3]:—" The fact is the Constitution Act of Canada only lays down broad but distinct well-guarded principles and lines of demarcation between the different legislative powers of separate legislative bodies, sometimes over the same subject, leaving these principles to be applied from time to time according to the ever-varying growth and changes in the subjects of legislation incident to a new and progressive country"; and again[4]:—" We must not expect to find that an organic Act of this kind will attempt to specify particularly even all the general heads of the subjects on which either Dominion or local legislatures can be expected to legislate. It

Leaving scope for future development

[1] These words are also cited per Richards, C.J., in Slavin *v.* The Village of Orillia, 36 U.C.R. at p. 178, 1 Cart. at p. 705, (1875).

[2] 36 U.C.R. at pp. 191-2, (1875).

[3] 1 B.C. (Irving) at p. 209, (1882).

[4] S.C. at p. 211.

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would require omniscience to foresee what in the course of time may arise to call for legislative interference. All that the framers of it could be expected to do would be what they have done in sections 91 and 92, lay down clear principles of distinction between the classes of subjects which were to be dealt with by the several legislatures, enunciate clear principles to guide them in their respective legislation, and compile the other sections of the Act with special, though inferential, reference to the guiding principles so laid down, and especially guarding against clashing of authority."

Elasticity of our Constitution.

And in North British and Mercantile, etc., Insurance Co. *v.* Lambe,[1] Tessier, J., says:—"In my opinion, the Confederation Act is a model of legislation which I have always admired. It required a great effort of science, intelligence, and experience to include in one law of 147 sections the regulation of interests so varied of several provinces covering an immense territory with different systems of law. The general terms employed show that the wish has been to give a general elasticity in our constitution. It is for our Courts to give a reasonable interpretation in order to reconcile all interests, and not create and favour those which are likely to raise conflicts."[2] "Much must of necessity, as occasion arises, be left to be supplied by judicial interpretation": per Harrison, C.J., in Ulrich *v.* The National Insurance Co.[3]

"The Imperial Act," says Peters, J., in Kelly *v.*

[1] M.L.R. 1 Q.B. at p. 167, 4 Cart. at p. 60, (1885).

[2] And so per Tessier, J., also in Poulin *v.* The Corporation of Quebec, 7 Q.L.R. at p. 339, 3 Cart. at p. 239, (1881).

[3] 42 U.C.R. at p. 156, (1877).

Sulivan,[1] "has bone and sinew, but, like the dry bones of the valley, it has yet to be clothed by many a judicial decision from all parts of the Dominion, tempered and corrected by the supreme tribunal, before its true form and features will become perfectly developed"; to which we may add the words of Crease, J., in Regina *v.* Wing Chong,[2] that "it is natural that in the working out of such a constitution in a new and growing country, questions should be continually cropping up, and call upon the Courts to define gradually and with greater exactness, as time progresses and population expands, the relative powers given by the Act to the Dominion and provinces respectively." Prop. 38 The function of the Courts.

And, in one of his short but trenchant articles in the *Legal News*,[3] "R." has touched upon this matter, saying in reference to the British North America Act:—"Plainly it is an outline the details of which are to be filled up on the suggestion of practical necessities. That this should be the case is evident to those who remember the circumstances of Confederation. The assent of the people of the four provinces had to be obtained. Manifestly it would have been impossible to get them to understand, and not less difficult to get them to adopt, a multitude of details. It was comparatively easy to indicate in general terms the powers of each government, and this is what was done. No one ever seriously contended that even the catalogues of sections 91 and 92 were perfectly conclusive. Therefore there must exist a doctrine resulting from, but The B.N.A. Act an outline.

[1] 2 P.E.I. at pp. 90-1, (1875).

[2] 2 B.C. (Irving) at p. 156.

[3] 7 L.N. at p. 49. "R" is, on good authority, believed to be the late Judge Ramsay.

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undeveloped in, the words of the Act. In practice, it may be added, the Privy Council has frequently laid down principles of the most abstract kind. It is difficult to conceive how, with any hope of avoiding, even by hair-breadth escapes, contradictions in the last degrees unsatisfactory and disquieting to litigants, the Courts are to proceed without adopting broad principles."[1]

Difficulty of interpretation.

At the same time, as pointed out by the Privy Council in Citizens Insurance Co. *v.* Parsons,[2] the very general language in which some of the powers of legislation are described in sections 91 and 92 of the British North America Act gives rise to considerable difficulty of interpretation[3]; and on the argument before the Board in the matter of the Dominion License Acts,[4] Sir Montague Smith said:—"It is the great misfortune of this Act that they have used such extremely general terms."

And before passing on to the next Proposition there are two passages in Story on the Constitution of the United States which are very apposite to the matters now under discussion. In the first he says[5]:—"It is to be taken that the sovereign

[1] In the Australian case of *Ex parte* Wallace & Co., 13 N.S.W., L. 1, (1892), Innes, J., says (at pp. 13-4) :—"Our Constitution Act is not so rigid and inexpansive that the varying circumstances in the development of our political system are not to have some effect on it. . . . It is well known that it is moulded on the lines of the English constitution, and in matters not expressly referred to we follow the precedents of the English constitution." For an article on the English Character of Canadian Institutions, by J. G. Bourinot, C.M.G., see *Contemporary Review* for October, 1892.

[2] 7 App. Cas. at p. 107, 1 Cart. at p. 271, (1881).

[3] See, also, per Ritchie, C.J., in The Queen *v.* Robertson, 6 S.C.R. at p. 111, 2 Cart. at p. 83, (1882).

[4] Transcript from Marten & Meredith's shorthand notes, at p. 127.

[5] 5th ed., Vol. 2, at p. 5. See, also, *ibid.*, pp. 569-70, note.

power, the people, in adopting the constitution and thereby giving to the Courts the function of interpretation, intended that interpretation should, within reasonable limits, be influenced by the demands of public policy and the public welfare, according to changes of time and circumstances; and that the Courts should not be tied down by the special state of things existing in times of a new and untried experiment in government. On that theory the Federal Supreme Court has often acted; so has Congress, and so has the Executive. There is reason for saying that the term 'police powers' cannot be held to mean at the present day all that it meant a hundred years ago." However, with reference to our constitution what is stated in Proposition 3 and the notes thereto must be remembered. And Story himself adds in the other passage referred to, a useful warning[1]:—"If the constitution is to be only what the administration of the day may wish it to be, and is to assume any and all shapes which may suit the opinions and theories of public men as they successively direct the public counsels, it will be difficult, indeed, to ascertain what its real value is. It cannot possess either certainty, or uniformity, or safety. It will be one thing to-day and another thing to-morrow, and, again, another thing on each succeeding day. The past will furnish no guide, the future no security. It will be the reverse of a law, and entail upon the country the curse of that miserable servitude so much abhorred and denounced, where all is vague and uncertain in the fundamentals of government." And the same learned writer in another place observes[2]:—"It has been justly remarked that the

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Story on the Constitution.

Public feeling may influence its interpretation,

Which, however, must be uniform and certain.

[1] *Ibid.* at p. 150.

[2] *Ibid.* at p. 654.

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erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. Time alone can mature and perfect so compound a system; liquidate the meaning of all the parts; and adjust them to each other in a harmonious and consistent whole."[1]

Time required to mature the system.

[1] Pomeroy, in his work on Constitutional Law, 8th Ed., p. 12, s. 17, says:—"In discussing the powers, capacities, incapacities, rights, and duties of the governmental agents, all appeals to general ideas of civil polity, all references to the analogies of other forms and other nations, from whom we may be supposed to have drawn some of our methods, all purely historical deductions, are and must be constantly restrained and limited by the letter itself of the written instrument. On the other hand, this written instrument is so much one of enumeration rather than of description; is so much an expression of general grants of power rather than the embodiment, in a codified form, of minute detail, that an appeal to history, to the analogies of other political organizations, and to fundamental ideas of civil polity, of justice and equity, is not entirely superseded, nay, is often absolutely necessary." See, however, Proposition 3 and the notes thereto.

PROPOSITIONS 39, 40, AND 41.

39. In order to construe the general terms in which the classes of subjects in sections 91 and 92 of the British North America Act are described, both sections and the other parts of the Act must be looked at, to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited.

40. The British North America Act has to be construed as a whole, and where some specific matter is mentioned as within the exclusive power of one body, Dominion Parliament or Provincial Legislature, as the case may be, which, but for that reference, would fall within the more general description of a subject-matter confided to the other, the statute must be read as excepting it from that general description.

41. With regard to certain classes of subjects generally described in section 91 of the British North America Act, legislative power may reside as to some matters

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falling within the general description of these subjects in the Legislatures of the Provinces; [and, in a sense, the converse is also true in certain cases, with regard to the subjects generally described in section 92 and the legislative power of the Dominion Parliament].

The first of the above Propositions is laid down by the Privy Council in Citizens Insurance Co. *v* Parsons,[1] and they again reassert the same principle in Russell *v* The Queen,[2] saying that sections 91 and 92 of the British North America Act must be read together, and the language of one interpreted and where necessary modified by that of the other, illustrating their meaning by the observation that it could not have been intended, while assuring to the provinces exclusive legislative authority, on the subject of property and civil rights, to exclude Parliament from the exercise of its general power to make laws for the peace, order, and good government of Canada in relation to matters not coming within the classes of subjects exclusively assigned to the provincial legislatures, whenever any such incidental interference would result from it.[3] And so in Attorney-General of Ontario *v.* Mercer,[4] their lordships say:—"The extent of the provincial power of legislation over 'property and civil rights in the province' cannot be ascertained without at the same time ascer-

Sections 91 and 92 of the B.N.A. Act must be read together.

[1] 7 App. Cas. at p. 110, 1 Cart. at p. 274, (1881).

[2] 7 App. Cas. at p. 839, 2 Cart. at p. 23, (1882).

[3] See *supra* at p. 396. And see, also, Proposition 26 and the notes thereto.

[4] 8 App. Cas. at p. 776, 3 Cart. at p. 12, (1883).

taining the power and rights of the Dominion under sections 91 and 102."[1] Prop. 39-41

And in Doyle *v* Bell,[2] Patterson, J.A., refers to the decisions of the Privy Council in the two cases above mentioned of Citizens Insurance Co. *v.* Parsons and Russell *v.* The Queen, as well as in L'Union St. Jacques de Montreal *v.* Belisle,[3] Dow *v.* Black,[4] Valin *v.* Langlois,[5] and Hodge *v.* The Queen,[6] and says of them:—"We have now the assistance of several decisions of the Privy Council, in which the duty is enforced of reading the British North America Act, and particularly these sections 91 and 92, as embodying a scheme of general legislation, and not to be construed in a narrow sense or without reading one part of the Act or the section with another." As Begbie, C.J., expresses it in the recent British Columbia case of Sauer *v.* Walker[7]:—"The Judicial Committee have pointed out that these two sections

The Act embodies a scheme of general legislation.

[1] See *supra* at pp. 432-3. In the argument on The Liquor Prohibition Appeal 1895, (at p. 209; see pp. 393, n. 1, 398, n. 1), Lord Halsbury, L.C., observes with immediate reference to the words 'regulation of trade and commerce' in No. 2 of section 91:—"I think one must bear in mind that you are not at liberty to construe these words in their ordinary natural meaning. You must take the words as used by the legislature. . . I cannot help thinking that you must give what I will call the statutory meaning to those words." This case is now reported [1896] A.C. 348. The words of Taschereau, J., in Huson *v.* The Township of South Norwich, 24 S.C.R. at p. 156, (1895), may be here noted:—"In cases of implied limitations or prohibitions of power it is not sufficient to show a possible or potential inconvenience. There must be a plain incompatibility, a direct repugnancy, or an extreme practical inconvenience, leading irresistibly to the same conclusion," quoting the words from Story on the Constitution of the United States, 5th ed., Vol. 1, s. 447.

[2] 11 O.A.R. at p. 334, 3 Cart. at p. 307, (1884).

[3] L.R. 6 P.C. 31, 1 Cart. 63, (1874).

[4] L.R. 6 P.C. 272, 1 Cart. 95, (1875).

[5] 5 App. Cas. 115, 1 Cart. 158, (1879).

[6] 9 App. Cas. 117, 3 Cart. 144, (1883).

[7] 2 B.C. (Hunter) at p. 95.

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91 and 92 are to be construed leniently, and, if possible, so as to give effect to the real intention of the whole Act."

And in Bank of Toronto *v.* Lambe,[1] in deciding upon the validity of a certain Act of the Quebec legislature passed in 1882, entitled 'An Act to impose certain direct taxes on certain commercial corporations,' the Privy Council say that the first thing to enquire into is whether the tax falls within the description of taxation allowed by No. 2 of section 92 of the Federation Act, namely, 'direct taxation within the province in order to the raising of a revenue for provincial purposes,' and, secondly, they say:—"If it does, are we compelled by anything in section 91 or in the other parts of the Act so to cut down the full meaning of the words of section 92 that they shall not cover this tax?"[2] And they point out[3] that in Citizens Insurance Co. *v.* Parsons,[4] when dealing with the meaning of the words "regulation of trade and commerce," in No. 2 of section 92:—"It was found absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures."[5]

Sections 91 and 92 are mutually restrictive.

An example of construing one class in section 91 by aid of the other is Lynch *v.* The Canada North-

[1] 12 App. Cas. at p. 581, 4 Cart. at p. 14, (1887).

[2] See Propositions 43 and 58, and the notes thereto.

[3] 12 App. Cas. at p. 586, 4 Cart. at p. 21.

[4] 7 App. Cas. 96, 1 Cart. 265, (1881).

[5] For other judicial *dicta* in accordance with Proposition 39, see per Wilson, J., in Regina *v.* Taylor, 36 U.C.R. at p. 20, (1875); per Henry, J., in Valin *v.* Langlois, 3 S.C.R. at p. 63, 1 Cart. at p. 199, (1879); per Ritchie, C.J., in Queen *v.* Robertson, 6 S.C.R. at p. 113, 2 Cart. at p. 84, (1882); per Burton, J.A., in *Re* Local Option Act, 18 O.A.R. at p. 591, (1891).

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west Land Company,[1] where the majority of the Court held in the words of Ritchie, C.J., (at p. 207), that "the matter of interest which was intended to be dealt with by the Dominion parliament[2] was in connection with debts originating in contract, and that it was never intended in any way to conflict with the right of the local legislature to deal with municipal institutions in the matter of assessments or taxation, either in the manner or extent to which the local legislature should authorize such assessments to be made," and that therefore a Manitoba Act imposing the addition of a percentage upon all municipal taxes unpaid by a certain date in each year was *intra vires*. "Does not the collocation of No. 19, 'interest,'" (says Ritchie, C.J., at p. 212), "with the classes of subjects as numbered 18, 'bills of exchange,' and 20, 'legal tender,' afford a strong indication that the interest referred to was connected in the mind of the legislature with regulations as to the rate of interest in mercantile transactions and other dealings and contracts between individuals, and not with taxation under municipal institutions and matters incident thereto?" and so, (at p. 225), Patterson, J., says:—"We find that article," (*sc.*, No. 19 of section 91), "associated with others numbered from 14 to 21, all of which relate to the regulation of the general commercial and financial system of the country at large. No. 19 is *ejusdem generis* with the others, and does not, in my judgment, include the matter of merely provincial concern with which we are now dealing."[3]

Construction of one class section 91 by reference to the others.

'Interest' in No. 19 of sect. 91, B.N.A. Act.

[1] 19 S.C.R. 204, (1891). See, as to this case, *supra* pp. 421-2.

[2] *Sc.* under No. 19 of section 91 of the British North America Act.

[3] As to "interest" in No. 19 of section 91, see, further, *supra* pp. 388-9; also per Burton, J.A., in Edgar *v.* The Central Bank, 15 O.A.R. at p. 202, 4 Cart. at p. 541.

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And a curious example of interpreting one of the classes in section 92 by reference to another of the classes in section 92 is to be found in Dulmage *v.* Douglas,[1] where the constitutionality of a provincial Act purporting to provide for the maintenance of courts of justice and court houses by the imposition of law stamps on legal proceedings was in question. The Court of Queen's Bench of Manitoba, on appeal from Dubuc, J., held the Act *ultra vires*, and Taylor, J., in delivering the judgment of the Court, says, (at pp. 498-9):—"The use of the words 'maintenance' in sub-section 14 of section 92 of the British North America Act cannot, as the learned judge seems to have thought it did, warrant the imposition of such stamps. That sub-section does authorize the legislature to make laws in relation to the maintenance of the provincial Courts, but it must clearly mean laws for their maintenance in such manner and by the exercise of such powers as are within the scope of the legislature. . . The power of the provincial legislatures as to taxation is defined by sub-section 2 of section 92, 'direct taxation within the province in order to the raising of a revenue for provincial purposes.' . . If this Act is one competent for the provincial legislature to pass, then the provisions of the British North America Act as to taxation by provincial legislatures amount to nothing, and they have unlimited powers of indirect taxation to raise a revenue for the maintenance of provincial institutions, and for carrying on the government of the province."[2] And so per Wilson, J., in Regina *v.*

Construction of one class in sect. 92 by reference to the others.

Provincial powers of taxation.

[1] 4 M.R. 495, (1887).

[2] As to Dulmage *v.* Douglas, and whether the provinces have any powers of indirect taxation, see, further, the notes to Proposition 66, *infra*. See, also, Attorney-General of Quebec *v.* Reed, 10 App. Cas. at p. 145, 3 Cart. at p. 195.

Taylor,[1] "power No. 13 as to property and civil rights must be qualified in its turn by power No. 2, for the right to deal with property and civil rights would not authorize the levying of any indirect tax." But although the provisions of sections 91 and 92 must be interpreted with reference the one to the other, and to other parts of the Act, it seems a somewhat strange construction to say that a certain legislative power might have been held to have been given by one of the classes specified in one of those sections, if another legislative power had not been given by another class specified in the same section.

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Construction of one class in sect. 92 by reference to the others.

As to the second of the leading Propositions now under discussion, as Mr. Benjamin observed upon the argument in Russell *v.* The Queen before the Privy Council on May 2nd, 1882,[2] referring to sections 91 and 92 of the British North America Act:—"The general rule of construction is one of course which your lordships will keep in view, that general words are controlled by special and specific provisions; that you do not take general words to override special provisions, but you take special provisions as constituting in their nature exceptions to the general words. Now, the two sections are side by side, and are to be construed together, and, if you find anything specially enumerated in that which the provinces retain for their home legislation, you cannot deprive them of that special legislation by saying it could be embraced in these other general words. It is possible to embrace them in (the) general words. It is true it is possible to do it, but if you look to nothing but (the) general

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General words and special provisions.

[1] 36 U.C.R. at p. 201, (1875).

[2] Second day at pp. 24-5. See *supra* at p. 398, n. 1.

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words there remains nothing for the province to act upon."[1]

And so in the City of Fredericton *v.* The Queen,[2] Henry, J., says that we must "ascertain if, in the employment of the general term," (*sc.*, the regulation of trade and commerce), "and the giving of power to another body to deal specifically with a subject that might be otherwise considered to be embraced by the general term," (*sc.*, licenses under No. 9 of section 92), "it was not intended that the specific power should not be considered as excepted from the general provision."[3]

The special provisions are exceptions.

The words of Proposition 40, however, which may be regarded as only a particular instance of the application of Proposition 39, are suggested by those of Burton, J.A., in Hodge *v.* the Queen.[4] As Begbie, C.J., says in the Thrasher Case[5]:—"All

[1] Thereupon the following took place:—Sir Montague Smith: "It is very difficult, because the legislature would appear to have reversed the general principle. They say, notwithstanding anything in the 92nd section contained, the classes that are enumerated at all events are to prevail, if there is anything like a conflict." Mr. Benjamin: "Undoubtedly, if there was anything like a conflict. If the Dominion parliament could not exercise its power of regulating trade and commerce, for example." Sir Montague Smith: "That declaration only applies to the enumerated provisions." See the passage quoted from Citizens Insurance Co. *v.* Parsons, 7 App. Cas. at p. 108, 1 Cart. at p. 273, *infra* pp. 488-90; see, also, per Sedgewick, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 230, 239, (1895). At pp. 240-1, he observes that Russell *v.* The Queen forbids the view that the exclusive right of a provincial legislature over a particular subject assigned to it "carved out" of a general subject is unlimited, and cannot be taken away by anything in section 91. See, also, S.C. at pp. 248-9.

[2] 3 S.C.R. at p. 551, 2 Cart. at p. 47, (1880).

[3] Cf. per Richards, C.J., in Regina *v.* Boardman, 30 U.C.R. at p. 556, 1 Cart. at p. 679, (1871), as to Dominion criminal law and provincial offences.

[4] 7 O.A.R. at p. 277, 3 Cart. at p. 181, (1882). And see per Burton, J.A., also, in *Re* Local Option Act, 18 O.A.R. at p. 589, (1891); per Draper, C.J., in Regina *v.* Taylor, 36 U.C.R. at p. 233, (1875).

[5] 1 B.C. (Irving) at p. 170, (1882).

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the sub-sections in section 92 (so far as they are exclusive) are exceptions out of the otherwise universal grant to the parliament of Canada in the first part of section 91." And in Severn *v.* The Queen,[1] Strong, J., observes:—"It is, I conceive, the duty of the Court so to construe the British North America Act as to make its several enactments harmonize with each other, and this may be effected, without doing any violence to the Act, by reading the enumerated powers in section 92 in the manner suggested, as exceptions from those given to the Dominion by section 91. Read in this way sub-section 2 must be construed to mean the regulation of trade and commerce, save in so far as power to interfere with it is, by section 92, conferred upon the provinces."[2] And,[3] speaking of the decision of the Court of Appeal for Ontario in Regina *v.* Taylor,[4] where it was held that the words 'other licenses' in No. 9 of section 92 gave power to impose licenses upon persons carrying on the trade of brewers,[5] Strong, J., says:—"This conclusion was reached by the consideration that all powers conferred in section 92 were to be read and regarded as exceptions to those enumerated in section 91, and by that section given to Parliament"; though he somewhat strangely adds:—"Section 92 was,

Powers in sect. 92 exceptions from those of sect. 91,

[1] 2 S.C.R. at p. 110, 1 Cart. at p. 454, (1878).

[2] Cf. per Strong, C.J., in Huson *v.* The Township of South Norwich, 24 S.C.R. at p. 150, (1895). Another way of putting the matter would be that the assignment to the provincial legislatures of power to make laws in relation to the sixteen subjects mentioned in section 92 shows that power to make laws in relation to the regulation of trade and commerce in No. 2 of section 91 means something different from the mere power to make laws in relation to any one of those sixteen classes of subjects.

[3] Severn *v.* The Queen, 2 S C.R. at p. 106, 1 Cart. at p. 450.

[4] 36 U.C.R. at p. 218.

[5] As to which see p. 27, n. 1, *supra*.

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therefore, to be construed as if it had been contained in an Act of the Imperial parliament, separate and apart from section 91, and is, therefore, to be read independently of that section," which, it is submitted, would be quite at variance with the rule of Proposition 39.[1]

In Hodge *v.* The Queen,[2] Burton, J.A., points out that in some instances it would be more correct to say that the Dominion parliament has been invested with a power excepted out of some general power conferred upon provincial legislatures. He says:— "There are cases in which the power is given generally to the provinces to deal with a particular subject. Take, for instance, 'property and civil rights,' which in these general terms would comprise the power to regulate contracts of every kind, including bills of exchange and promissory notes. When therefore we find the Dominion entrusted with an exclusive power to legislate upon bills and notes, the only way to make the Act consistent is to read this as an exception to the general power granted to the province. So again, although the provinces have exclusive power under sub-section 14 to make laws in relation to the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and criminal jurisdiction, when we find bankruptcy and insolvency

Except where the converse is the case.

[1] For other *dicta* in accordance with Proposition 40, see Mackay, J., in *Ex parte* Leveillé, 2 Steph. Dig. at p. 446, 2 Cart. at p. 350, (1877); per Taschereau, J., in Angers *v.* The Queen's Insurance Co., 16 C.L.J., N.S., at p. 204, 1 Cart. at p. 149, (1880), who seems to overlook the fact that the provincial power of direct taxation is confined to raising a revenue for provincial purposes; per Dorion, C.J., in Bank of Toronto *v.* Lambe, M.L.R. 1 Q.B. at p. 134, 4 Cart. at p. 33, (1887); per Osler, J.A., in Clarkson *v.* The Ontario Bank, 15 O.A.R. at p. 190, 4 Cart. at p. 527, (1888). Reference may also be made to a letter signed "George Patterson," in 21 C.L.J. 341, in connection with Proposition 40.

[2] 7 O.A.R. at p. 274, 3 Cart. at p. 179.

mentioned as a subject for the exclusive jurisdiction of the Dominion we must necessarily understand that the organization of an insolvent Court, and administration of justice and proceedings connected with insolvency, are excepted from the general words of that sub-section. But to that extent only can the Dominion parliament assume to interfere. . . . Adopting the same rule of construction, sub-section 15 of section 92 must, in my opinion, be read as an exception or modification of sub-section 27 of section 91, which vests in the Dominion parliament the power to deal generally with the criminal law."[1]

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Powers in sect. 91 excepted out of those in sect. 92.

What is laid down in Propositions 39 and 40 is a very different thing from what is said by Gray, J., in the Thrasher Case,[2] namely, "that the provisions of any particular section of the Act must be read, as affected by and subject to the general objects, uses, and powers for which the Union was made, and for maintaining which efficiently the British North America Act was passed."[3] In the course of the argument in Russell *v.* The Queen,[4] Sir Montague Smith observed:— "I do not think there is anything so obscure in the construction of the Act with regard to the distribution of power and the dominium given to the Dominion of Canada that renders it necessary to go into the history of it."

Interpretation to be confined to the terms of the Act.

Passing now to Proposition 41, it is taken, with the exception of the words in square brackets, from

Prop. 41.

[1] It may be observed that in the Quebec Resolution No. 43 (15) the words are:—"Property and civil rights, excepting those portions thereof assigned to the general parliament." See, also, *supra* pp. 362-3; also pp. 433-4, and 440, n. 5.

[2] 1 B.C. (Irving) at p. 225, (1882).

[3] As to which see Propositions 2, 3, and 4, and the notes thereto.

[4] Second day, at p. 68. See p. 398, n. 1, *supra*.

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the judgment of the Privy Council in the Citizens Insurance Co. *v.* Parsons,[1] and expresses the conclusion at which the Judicial Committee arrived from the consideration of the fact, that notwithstanding the endeavour of section 91 of the British North America Act to give pre-eminence to the Dominion parliament in case of a conflict of powers,[2] it is obvious that in some cases in which this apparent conflict exists the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion parliament. For example, they say that solemnization of marriage would come within the general description 'marriage and divorce,' which is contained in the enumeration of subjects in section 91, yet 'solemnization of marriage in the province' is enumerated among the classes of subjects in section 92, and no one can doubt, notwithstanding the general words of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces.[3] So the raising of money by

Broad classes of sect. 91

Not intended to absorb those in sect. 92.

[1] 7 App. Cas. at p. 108, 1 Cart. at p. 273, (1881).

[2] See *supra* at pp. 427-9, and p. 430, n. 4.

[3] As to 'marriage and divorce' and 'solemnization of marriage in the province,' reference may be made to the speech of Solicitor-General Langevin in the Debates on Confederation in the parliament of Canada, (at p. 388), where he says:—"The word 'marriage' has been placed in the draft of the proposed constitution to invest the Federal parliament with the right of declaring what marriages shall be held and deemed to be valid throughout the whole extent of the confederacy, without, however, interfering in any particular with the doctrines or rights of the religious creeds to which the contracting parties may belong." It appears from the official report of the debate that the above words were read by the speaker from some written document, and when asked by the present author to explain the source of this extract, Sir Hector Langevin most kindly supplied the following information in a letter of August 25th, 1894:—"I was entrusted by my leaders, Sir John A. Macdonald and Sir George Cartier, with the explanation not only of the general features of the proposed constitution, but also of some very important details which they could not have given in their own speeches without having lengthened their

'Marriage and Divorce' and 'Solemnization of marriage.'

any mode or system of taxation is enumerated among the classes of subjects in section 91, but the description is sufficiently large and general to include 'direct taxation within the province in order to the raising of a revenue for provincial purposes' assigned to the provincial legislature by section 92, and it obviously could not have been intended that in this instance also the general power should override the particular one. In these cases their lordships add :—"It is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective

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Courts must limit and define.

speeches unduly. My explanations were those of the government, and on the question of marriage and divorce, in order that there might be no equivocation or misunderstanding, it was agreed between my colleagues and myself that I would put in writing those eight lines that you quote in your letter, and are found at p. 388 of the English version, and p. 395 of the French version, of the Confederation Debates of 1865. Those eight lines cover and give the meaning that the conference of 1864 put on the words 'marriage and divorce,' which meaning was confirmed by the adoption of the proposed constitution in 1865, and later on in London, when all and every detail of the draft of the constitution were discussed and finally delivered to the government of Great Britain and passed by the Imperial parliament." Reference may also be made to the opinion of the Law Officers of the Crown in England in 1870, (Dom. Sess. Pap., 1877, No. 89, p. 340), to the effect that under 'the solemnization of marriage in the province,' the provincial legislatures have the power of legislating upon the subject of the publication of and the issue of marriage licenses ; while 'marriage and divorce,' in section 91, "signify all matters relating to the status of marriage, between what persons and under what circumstances it shall be created, and (if at all) destroyed." This opinion is quoted at length by Doutre on the Constitution of Canada, at p. 238. See, also, *supra* at p. 63. Mr. Todd, (Parliamentary Government in the British Colonies, 2nd ed., at pp. 197-8), mentions certain Acts of colonial legislatures relating to marriage and divorce which have been from time to time disallowed in England. And see *ibid.* at p. 794, *et seq.*, on the general subject. See, also, per Gwynne, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at pp. 568-70, 2 Cart. at p. 60, (1880), and the letter of an "Exile" in 18 C.L.J. at p. 246, commenting on the language of the Privy Council in Citizens Insurance Co. *v.* Parsons, quoted in the text ; also, McDougall *v.* Campbell, 41 U.C.R. at pp. 337 and 341, as to power over the subject of granting alimony being in the provincial legislatures.

Sir Hector Langevin's speech in debates on Confederation.

Law officers of the Crown

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powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result the two sections must be read together, and the language of one interpreted and, where necessary, modified by that of the other."[1] And so in Lambe *v.* The Canadian Bank of Commerce,[2] Rainville, J., says, after referring to the opening clauses of section 91:—"It would seem, then, that with regard to all matters specially mentioned in section 91 the provincial legislatures have no power, even if there should be found in the 29 classes matters which by section 92 seem to be exclusively assigned to the provincial legislatures. However, as was stated by the Privy Council in the case of the Citizens Insurance Co. *v.* Parsons these two sections must not be interpreted so absolutely, and a reasonable interpretation must be assigned to them in cases where the same matters are designated in the classes of these two sections."[3]

A reasonable interpretation must be reached.

[1]The above words are referred to and commented on by Ritchie, C.J., in Queen *v.* Robertson, 6 S.C.R. at pp. 111-6, 2 Cart. at p. 83, (1882).

[2]13 R.L. 146 at p. 152, (1883).

[3]In the argument before the Supreme Court of Canada in the Matter of the Dominion License Acts, 1883-4, (Dom. Sess. Pap., 1885, No. 85, at p. 136), Mr. G. F. Gregory, of counsel for New Brunswick and Nova Scotia, thus expresses the ideal aim in the matter:—"It will be for Parliament and the respective legislatures in the first instance, and for the Courts as a last resort, to attach such a limited meaning to the classes of subjects mentioned in these sections respectively," (*sc.*, sections 91 and 92 of the British North America Act), "as will make them distinct, and as each subject of legislation is presented to determine as best they can what class of legislation it falls in, Parliament and the legislatures being held to a *bonâ fide* exercise of their powers within their respective limits. . . . In this way the Courts of Appeal and of last resort will from time to time put down milestones and landmarks to mark the division line between these two classes of subjects. It may not be an absolutely straight line, but it will be as useful and practical, whether it be a straight line or otherwise, so long as it becomes a certain line; and by degrees this line will become marked by the milestones which the Courts will lay down, so that eventually those classes will be so understood by every one that we can easily determine within which class of subjects a matter of legislation falls." And so per Ramsay, J., in North British and Mercantile, etc., Insur-

The ideal in view.

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Shortly after their above judgment in Citizens Insurance Co. *v.* Parsons, the Privy Council, in Dobie *v.* The Temporalities Board,[1] referred to the principles laid down therein, and said that they saw no reason to modify them in any respect, and so again, in Bank of Toronto *v.* Lambe,[2] they referred to this subject, and to their language in Citizens Insurance Co. *v.* Parsons, and say:—"Their lordships adhere to that view, and hold that as regards direct taxation within the province to raise a revenue for provincial purposes that subject falls wholly within the jurisdiction of the provincial legislatures." In such cases, to quote another expression of the Privy Council in Bank of Toronto *v.* Lambe[3]:—"The literal meaning of the words in section 91 should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures." As Begbie, C.J., puts it in The Queen *v.* Howe[4]:—"We must put a reasonable construction on these two sets of general words."

The literal meaning of words must be restricted.

As it has been often expressed the subjects enumerated in sections 91 and 92 in many cases "overlap,"[5] or to use an expression of Lord Watson's on the argument before the Privy Council on the Manitoba School case, 1894, Brophy *v.* Attorney-

Overlapping of subjects in sects. 91 and 92.

ance Co. *v.* Lambe, M.L.R. 1 Q.B. at p. 169, 4 Cart. at p. 62:—"The work of reconciling these conflicting expressions must go on till all the possible cases have been disposed of."

[1] 7 App. Cas. at p. 148, 1 Cart. at p. 366, (1882).

[2] 12 App. Cas. at p. 585, 4 Cart. at p. 20, (1887).

[3] 12 App. Cas. at p. 586, 4 Cart. at p. 21.

[4] 2 B.C. (Hunter) at pp. 38-9, (1890). See, also, per Begbie, C.J., in Poole *v.* The City of Victoria, 2 B.C. (Hunter) at p. 275, (1892).

[5] As per Cross, J., in North British & Mercantile Fire and Life Insurance Co. *v.* Lambe, M.L.R. 1 Q.B. at p. 151, 4 Cart. at p. 47, (1885). And see *supra* pp. 353-5.

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General of Manitoba,[1] "interlace"; and it is especially this "double enumeration" which causes difficulty in the construction of the British North America Act[2]; and has been sometimes made the subject of hostile comment.[3]

They are 'exclusive' only in a broad and general sense.

In Ackman *v.* Town of Moncton,[4] Palmer, J., deals with the matter by saying that in his view the powers of the federal government and parliament, and likewise those of the provincial government and parliament, as given by the British North America Act, are only "exclusive in a broad and general sense," and that it is obvious that the "exercise by either of the powers conferred on it must of necessity, in many cases, in some degree affect subjects over which exclusive control is given to the other"; and he proceeds to cite examples. Each, he says, must be allowed "to exercise its respective powers,

[1] See transcript from Marten & Meredith's shorthand notes at p. 216.

[2] And so per Ramsay, J., in Attorney-General of Quebec *v.* Attorney-General of the Dominion, 2 Q.L.R. at p. 243, 3 Cart. at p. 107, (1876). On the argument in the matter of the Dominion License Acts, 1883-4, before the Privy Council, Sir Montague Smith observes:—"The fact that the legislation may be under one section or the other is one of the great difficulties in the construction of this Act:" (Transcript from Marten & Meredith's shorthand notes at p. 51).

[3] Per Ramsay, J., who calls it "a faulty construction," in North British & Mercantile Fire and Life Insurance Co. *v.* Lambe, M.L.R. 1 Q.B. at p. 190, 4 Cart. at p. 81; and even "vicious": Angers *v.* Queen Insurance Co., 22 L.C.J. at p. 308, 1 Cart. at p. 132, where he arrives at the conclusion that "the exclusive authority of Parliament is absolute, while that of the several legislatures is only so when the matter does not clash with powers specially conferred on Parliament"; otherwise, he says:—"If the two enumerations clash, we should thus have two exclusive jurisdictions over the same matter, which is impossible." See Proposition 37 at pp. 432-3, *supra*. On the other hand, Dorion, C.J., in Dobie *v.* The Temporalities Board, 3 L.N. at p. 254, 1 Cart. at p. 386, says:—"I consider that the Act is as clear as it could be made to embrace so many questions in a small compass." As Taschereau, J., says, however, in Angers *v.* Queen Insurance Co., 16 C.L.J., N.S., at p. 205, 1 Cart. at p. 149:—"A literal interpretation of these two sections would make them contradictory." And see *supra* at p. 210, *et seq.*

[4] 24 N.B. at pp. 110-1, (1884). And see Propositions 27 and 28 and the notes thereto.

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although such exercise may in some degree affect subjects, to make laws in regard to which exclusive powers are given to the other."[1] As Wilson, J., says in Regina *v.* Taylor,[2] if objects of legislation are lawful objects, "and if they can be properly adopted, they do not become unlawful, because they cannot be wholly separated from every other matter, and because they are attended with their inevitable consequences."[3]

Overlapping in sects. 91 and 92 of B.N.A. Act.

And although it is not mentioned in our leading Proposition, it will be found that not only do some of the enumerated subjects in section 92, such as property and civil rights in the province, overlap in a certain sense some of the enumerated subjects in section 91, and *vice versâ*, but if either of these two sections are taken separately, in some instances the subjects enumerated in the same section overlap the one the other. As Cross, J., says in Regina *v.* Mohr[4]: —"We have a series of special powers attributed to each of the respective legislatures, some of which may have very indefinite limits, and some of which in each series may be found in their extension to overlap and interfere with the extent of some in the other series, those not included in either falling, of course, to the jurisdiction of the Dominion parliament, including those specially excepted in the enumeration of powers attributed to the local legislatures."[5]

[1] In North British and Mercantile, etc., Insurance Co. *v.* Lambe, M.L.R. 1 Q.B. at p. 169, 4 Cart. at p. 62, Ramsay, J., refers to "the evident misuse of the word 'exclusively' in each section."

[2] 36 U.C.R. at p. 206, (1875).

[3] See *supra* pp. 457-60.

[4] 7 Q.L.R. at p. 191, 2 Cart. at p. 268, (1881).

[5] As to which see Proposition 26 and the notes thereto.

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And as to section 91, as Sir Farrer Herschell, of counsel for the Dominion, observed on the argument in the matter of the Dominion License Acts[1]: —"It must be remembered that the enumerated subjects in that section are only subordinate enumerations for greater certainty, but not to exclude the generality of the words that go before; and when they are simply specifying things for greater certainty, some of those specifications may very well overlap. They may very well include certain things that would be included within the more general terms, but they specified them for greater certainty."[2]

Classes in sect. 91 only subordinate enumerations.

[1] See transcript from Marten & Meredith's shorthand notes at p. 167.

[2] And see *supra* at pp. 308-9.

PROPOSITION 42.

42. The Dominion Parliament and Provincial Legislatures have power to legislate conditionally; for instance, by enacting that an Act shall come into operation only on the petition of a majority of electors.[1]

The above Proposition, which might be regarded as a necessary corollary to Proposition 17, is as regards the Dominion parliament, (and it must apply equally to provincial legislatures),[2] derived from the judgment of the Privy Council in Russell *v.* The Queen,[3] where, speaking of the Canada Temperance Act, 1878, the constitutional validity of which was in question, their lordships say:—"The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition, and everything which is to follow, upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the parliament of Canada, when the subject of legislation is within its competency. Their lordships entirely agree with

Russell *v.* The Queen.

Local option

[1] See, in connection with this Proposition, Propositions 50 and 63, and the notes thereto.

[2] See Propositions 17 and 19.

[3] 7 App. Cas. at p. 835, 2 Cart. at p. 17, (1882).

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the opinion of Chief Justice Ritchie,[1] on this objection. If authority on the point were necessary, it will be found in the case of Regina *v.* Burah, 3 App. Cas. at p. 889,[2] lately before this board."

Regina *v.* Burah.

In Regina *v.* Burah the Judicial Committee had held that the Governor-General of India in Council, who under the India Councils Act, 1861, 24-25 Vict., c. 67, has a general power of legislation over all persons in Her Majesty's territories in India, had power to legislate conditionally, by conferring on the governor of Bengal the power to determine whether a certain Act shall be applied in a certain district.

Conditional legislation.

In their judgment they say[3]:—"Legislation conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the legislature to persons in whom it places confidence, is no uncommon thing; and in many circumstances it may be highly convenient. The British statute book abounds with examples of it; and it cannot be supposed that the Imperial parliament did not, when constituting the Indian legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred."

[1] See 3 S.C.R. at p. 529, 2 Cart. at p. 29. Ritchie, C.J., cites from Cooley on Limitations, 4th ed. at p. 142, as follows:—"It is not always essential that a legislative act should be a completed statute, which must in any event take effect as law, at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may depend upon some subsequent event." See Proposition 50 and the notes thereto.

[2] 3 Cart. 409, (1878).

[3] 3 App. Cas. at p. 906, 3 Cart. at p. 430.

PROPOSITION 43.

43. In determining the validity of a Dominion Act, the first question to be determined is, whether the Act falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces. If it does, then the further question will arise, whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and so does not still belong to the Dominion Parliament. But if the Act does not fall within any of the classes of subjects in section 92, no further question will remain.

The above Proposition is taken from the judgment of the Privy Council in Russell *v.* The Queen,[2] who there refer again to their judgment in Citizens Insurance Co. *v.* Parsons,[3] where they enunciate what is really the same rule as applied to an enquiry into the validity of a provincial Act. Their lordships add :—" It cannot be contended, and, indeed, was not contended at their lordships' bar, that, if the Act does not come within one of the classes of subjects

Russell *v.* The Queen.

[1] See Proposition 66 and the notes thereto.

[2] 7 App. Cas. at p. 836, 2 Cart. at p. 19, (1882).

[3] 7 App. Cas. at p. 109, 1 Cart. at p. 273, (1881). See Proposition 58.

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assigned to the provincial legislatures, the parliament of Canada had not, by its general power, to make laws for the peace, order, and good government of Canada, full authority to pass it."[1]

Variation in rule as stated in Citizens Ins. Co. *v.* Parsons.

In the form of the rule as stated in Citizens Insurance Co. *v.* Parsons, the words which take the place of "and so does not still belong to the Dominion parliament" in the Proposition under discussion are, "and whether the power of the provincial legislature is or is not thereby overborne"; and on the argument before the Privy Council in Russell *v.* The Queen, in 1882,[2] Sir Montague Smith said, referring to the judgment of the board in Citizens Insurance Co. *v.* Parsons:— "That decision left open the question whether the special powers of section 92 may not in some cases be overborne by the more general powers of section 91. . . We expressly said that the question did not arise whether, when it," (*sc.*, the subject-matter of an Act), "was apparently within one and also within the other, the 91st section might not overbear it. That question did not arise in that case. There we held, rightly or wrongly, that what was done was not a regulation of trade and commerce. We decided that it did fall within that sub-section of section 92 as to property and civil rights. The question of one over-riding the other did not arise. If it had been an interference with the regulation of trade and commerce, a question would have arisen which did not arise."[3]

The explanation.

[1] As to which see Proposition 26 and the notes thereto.

[2] 1st day, at pp. 10, 54. See *supra* p. 398, n. 1.

[3] See Proposition 58, *infra*. Reference may be made as to the variation in the way in which the rule is stated in the two cases to the remarks of Mr. G. F. Gregory, *arguendo*, before the Supreme Court of Canada, in the Matter of the Dominion License Acts, 1883-4: Dom. Sess. Pap., 1885, No. 85, at p. 130. On the argument in the same

But as the authorities noted under Proposition 41, *q.v.*, show the subject-matter of a provincial Act may fall within one of the general subjects enumerated in section 91, in a broad interpretation of the latter, and yet the provincial legislature may have exclusive power to deal with it. "The exceeding generality of the words must be applied with very considerable modifications indeed": per Crease, J., in the Thrasher Case.[1] Prop. 43

In Propositions 43 and 58, then, we have the rule correctly expressed rather than in the words of Gwynne, J., in City of Fredericton *v.* The Queen,[2] repeated by him in Citizens Insurance Co. *v.* Parsons,[3] and The Queen *v.* Robertson,[4] and which he says appear to him to furnish an unerring guide in determining whether any given subject of legislation is within the jurisdiction of the provincial legislatures Gwynne, J.'s rule or test.

case before the Privy Council, Sir Farrer Herschell puts the rule thus:— "For determining the question whether any matter is a matter within the exclusive jurisdiction of the province, the proper course is first to look at section 92, to see whether it comes within any of the clauses enumerated there. If it does not, then there is an end of the contention that it is within the exclusive legislature of the province. But even if you do find it in section 92, then you have to look to section 91 and see whether you find it in section 91, because if it be in section 91, then so far section 91 over-rides and limits section 92. . . Unless you can read the two together, and give a so much larger meaning to the words in section 91 that you can still leave section 92 to have effect, I should think section 91 over-rode section 92, because it says that 'it is hereby declared that notwithstanding anything in this Act,'—that must include the words in section 92,—'the exclusive legislative authority of the parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated,'—so that I should have said if there was any inconsistency between section 92 and 91, section 91 over-rode section 92": Printed transcript from Marten & Meredith's shorthand notes, pp. 31, 89-90. At p. 63, where Sir Farrer Herschell again speaks of section 91 over-riding section 92, Lord Hobhouse, one of the Board, corrects him, saying:—"It,"(*sc.*, section 91),"may override the construction of section 92." See, also, *supra* at pp. 427-9. Sir F. Herschell's statement of the rule.

[1] 1 B.C. (Irving) at p. 206, (1882).

[2] 3 S.C.R. at pp. 564-5, 2 Cart. at p. 56, (1880).

[3] 4 S.C.R. at pp. 329-30, 1 Cart. at p. 335.

[4] 6 S.C.R. at p. 64, 2 Cart. at p. 118.

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or of Parliament, namely:—"All subjects of whatever nature, not exclusively assigned to the local legislatures, are placed under the supreme control of the Dominion parliament, and no matter is exclusively assigned to the local legislatures unless it be within one of the subjects expressly enumerated in section 92, and, at the same time, [is outside of the several items enumerated in section 91, that is to say,[1]] does not involve any interference with any of the subjects enumerated in section 91." For not only does this seem to ignore what is stated in Proposition 41, just referred to, but Proposition 61 and the notes thereto show that it is at least liable to mislead to say that provincial legislation may never involve any interference with Dominion subjects.[2]

Objections to it.

Per Ritchie, C.J.

In The Queen *v.* Robertson,[3] Ritchie, C.J., indeed, says:—"In construing the British North America Act, no hard and fast canon or rule of construction can be laid down and adopted, by which all Acts passed as well by the parliament of Canada as by the local legislatures upon all and every question that

[1]The words in square brackets are inserted in the rule as enunciated by the learned judge in The Queen *v.* Robertson, 6 S.C.R. at p. 64, 2 Cart. at p. 118.

[2]In the recent case of *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 213, (1895), Gwynne, J., thus expresses the rule, as being, "according to the canons of construction, as laid down by this Court in City of Fredericton *v.* The Queen, and by the Judicial Committee of the Privy Council in Russell *v.* The Queen,"—"between which," he adds, "I do not find there is any substantial difference":—"Even though a particular subject of legislation may be capable of being construed to come within section 92, reading that section by itself, still, if that subject comes within any of the items enumerated in section 91, it is taken out of the operation of section 92, which in such case has to be construed as not comprehending such subject." Of course if the subject-matter falls within the enumerated subjects in section 91, as strictly defined in their meaning under the Act, then the power of the provincial legislature is overborne.

[3]6 S.C.R. at p. 110, 2 Cart. at pp. 81-2.

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may arise, can be effectually tested as to their being or not being *intra vires* of the legislature passing them." He goes on to say:—"The nearest approach to a rule of general application that has occurred to me for reconciling the apparently conflicting legislative powers under the British North America Act, is what I suggested in the cases of Valin *v.* Langlois,[1] and the Citizens Insurance Co. *v.* Parsons,[2] with respect to property and civil rights over which exclusive legislative authority is given to the local legislatures, that as there are many matters involving property and civil rights expressly reserved to the Dominion parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special legislative powers of the Dominion parliament.[3]

Property and civil rights.

[1] 3 S.C.R. at p. 15, 1 Cart. at p. 172, (1879).

[2] 4 S.C.R. at p. 242, 1 Cart. at p. 292, (1880).

[3] See *supra* pp. 425-438.

PROPOSITION 44.

44. Before the laws enacted by the Federal authority within the scope of its powers, the provincial lines disappear; for these laws we have a quasi legislative union; these laws are the local laws of the whole Dominion, and of each and every province thereof.

This Proposition is taken from the words of Taschereau, J., in Citizens Insurance Co. *v.* Parsons,[1] and is in harmony with the statement of law in Proposition 46, that where over matters with which provincial legislatures have power to deal, provincial legislation directly conflicts with enactments of the Dominion parliament, whether strictly relating to the enumerated classes of subjects under section 91, or by way of provisions ancillary to legislation on the said classes of subjects, the provincial legislation must yield to that of the Dominion parliament.[2]

Dominion laws prevail in cases of direct conflict.

At the passage referred to, Taschereau, J., proceeds :—" The Dominion as to such laws is but one

[1] 4 S.C.R. at p. 307, 1 Cart. at p. 326, (1880). And cf. the words of Badgley, J., in L'Union St. Jacques de Montreal *v.* Belisle, 20 L.C.J. at p. 31, 1 Cart. at p. 74.

[2] In Baxter *v.* The Central Bank of Canada, 20 O.R. at p. 214, (1890), we have a case of an Ontario Court enjoining the plaintiff in a case in a Montreal Court from proceeding in his action so far as he complained of the official conduct of liquidators appointed by an Ontario Court in certain winding-up proceedings under the Dominion Winding-up Act, then being carried on in the latter Court.

country having but one legislative power, so that a contract made under these laws in Ontario, or any one of the provinces, is to be considered, territorially, or with respect to locality, as a contract in the Dominion, and as such governed by the Dominion laws, and not as a contract locally in the province, governed by the provincial laws. This is why the contracts to convey passengers and goods on the railways under Dominion control, for instance, the contract made by the sender of a message with a telegraph company, the contracts of a sale of bank stocks, are all and every one of them, when made anywhere in the Dominion, regulated by federal authority. And the power of the federal authority to so regulate them has never been doubted; yet are they not all local transactions and personal contracts? Undoubtedly they are; but these railway companies, these telegraph companies, these banking companies, being under the federal control, their contracts are necessarily under the same control absolutely and exclusively. It would be impossible for them to carry on their business if each province could impose upon them and their contracts different conditions and restrictions. A Dominion charter would be absolutely useless to them if the constitution granted to each province the right to regulate their business."[1]

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As to them the Dominion one country.

Dominion laws as to contracts.

[1] See, also, per Taschereau, J., S.C., 4 S.C.R. at pp. 312-4, 1 Cart. at pp. 331-2. Nevertheless, the cases referred to in Proposition 61 show that Dominion legislation may be in some degree interfered with by provincial legislation. And a question might perhaps be raised as to whether the exclusive power thus given to the Dominion parliament by the combined effects of section 91 and 92 of the British North America Act to make laws in relation to matters coming within the class of 'railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province,' etc., extends to regulating the contracts and business in the different provinces of such companies. No. 15 of section 91, which was in question in Tennant *v.* The Union Bank, [1894] A.C. 31, specifically gives power to make laws in relation to all matters coming within the subject of banking, which obviously includes the business carried on by banks.

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But as the judgment of the Judicial Committee in that case shows, the learned judge omitted to draw the necessary distinction that the power of the Dominion parliament to regulate in the different provinces the contracts and other business of a corporation depends, not upon its power to incorporate companies to do business throughout the Dominion, but upon whether such power to regulate their business comes or does not come within one of the enumerated classes of section 91. As the judgment shows, the power to incorporate companies to do business throughout the Dominion belongs to the Dominion under their general residuary power of legislation, inasmuch as the only companies which the provincial legislature can incorporate are those with provincial objects, under No 11 of section 92.[1] Thus the Dominion parliament had power to incorporate insurance companies authorized to transact their business throughout the Dominion, but the regulation of the insurance business carried on by such a company in any given province is not committed to Parliament by any of the enumerated classes of section 91, and their lordships held that such legislation did not come within what is meant by the regulation of trade and commerce in No. 2 of section 91. In such cases as the decisions in Citizens Insurance Co. *v.* Parsons,[2] and Colonial Building Association *v.* The Attorney-General of Quebec,[3] cited in the notes to Proposition 55, show, contracts made in a particular province are subject to the laws of that particular province, though

When Dominion can regulate contracts and when not.

Citizens Ins. Co. *v.* Parsons.

[1] See 7 App. Cas. at pp. 116-7, 1 Cart. at pp. 282-3. As to what are companies with provincial objects, see the notes to Proposition 55.

[2] 7 App. Cas. 96, 1 Cart. 265, (1881).

[3] 9 App. Cas. 157, 3 Cart. 118, (1883).

made by a company operating under a Dominion charter, even though statutory. Prop. 44

As Mr. Dickey says in his report as Minister of Justice, of March 12th, 1896, recommending the disallowance of a certain Manitoba statute requiring Dominion and other corporations "duly authorized to carry out or effect any of the purposes or objects to which the legislative authority of the legislature of Manitoba extends" to obtain a license from the provincial Lieutenant-Governor before carrying on its business in the province,[1]—the recent decisions of the Privy Council in Tennant *v.* The Union Bank of Canada,[2] and Attorney-General of Ontario *v.* Attorney-General of Canada,[3] show "that the legislative powers of the parliament of Canada depending upon section 91[4] may be fully exercised, although with the effect of modifying civil rights in the province; also that the Dominion parliament, in legislating with regard to a subject enumerated in section 91, has power to enact ancillary provisions, relating to the enumerated subjects, and affecting rights, which but for the enactment of such provisions by Parliament would have been within the legitimate range of provincial legislation."[5] And so *In re* Canadian Pacific R. W. Co. and

Recent report of Mr. Dickey, Minister of Justice, on the subject.

[1]Hodgins' Provincial Legislation, 2nd ed. at pp. 1009-10.

[2][1894] A.C. 31.

[3][1894] A.C. 189.

[4]That is upon the enumerated classes of section 91, to which the Minister would seem to be referring. See, however, *supra* pp. 435-8.

[5]See Proposition 37 and the notes thereto, especially at pp. 431-2; also Proposition 46 and the notes thereto. The question of the right of provincial legislatures to require foreign corporations to take out licenses before carrying on business is of course a different one from that under discussion here, namely, under what laws their business must be carried on, whether Dominion or provincial,—and will be found discussed in the notes to Proposition 55, *infra*.

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County and Township of York,[1] Rose, J., says in reference to certain provisions of the Dominion Railway Act, 1888, which empowered the Railway Committee of the Privy Council to make orders for the necessary protection of railway crossings, and to apportion the costs thereof between the company, "and any person interested therein," which the Committee had interpreted to include municipalities:—"It must be borne in mind that when the parliament of Canada is legislating respecting any subject within its exclusive legislative authority, its jurisdiction and powers cannot be affected, limited, or controlled by any provincial legislation; it deals with the Dominion as a whole, irrespective of any territorial divisions, municipal or otherwise. Therefore, if a provincial legislature sees fit to create a municipal corporation and to vest in such corporation highways or lands, such legislation manifestly cannot prevent the parliament of Canada from dealing with such lands so vested in such corporation, and the corporation in which they are vested, in the same way and manner as if such lands had been in the hands of private citizens."

Parliament deals with the Dominion as a whole.

And a curious instance of the way in which the legislative scope open to the provinces may depend upon Dominion legislation is suggested by a passage in the judgment of Gwynne, J., in Lynch *v.* The Canada North-West Land Co.,[2] R.S.C., c. 127, sec-

[1] 27 O.R. 559, at p. 569, (1896).

[2] 19 S.C.R. at p. 223, (1891). Cf. per Dubuc, J., in Schultz *v.* City of Winnipeg, 6 M.R. at p. 45. And as to legislative power as to interest, and No. 19 of section 91 of the British North America Act generally, see *supra* pp. 388-90. In a report as Minister of Justice on some Quebec Acts, on February 12th, 1894, (Hodgins' Provincial Legislation, 2nd ed., p. 461), Sir J. Thompson says:—"The provincial legislature has, of course, no power to authorize any Act which has been constituted an offence by Parliament."

tion 1, enacts that:—"Except as otherwise provided by this or by any other Act of the parliament of Canada any person may stipulate for, allow, and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon"; and, accordingly, at the place referred to, Gwynne, J., says:—"The provincial legislatures can undoubtedly pass an Act authorizing the issue by the provincial government of debentures payable with any rate of interest that may be agreed upon between the government and its creditors or persons advancing money to the government upon the security of such debentures, for such an Act would be in the nature of a contract or legislative affirmation of a contract, and any rate of interest may be made payable by contract *inter partes*." Prop. 44

Provincial scope may depend on Dominion law.

In the course of the argument before the Privy Council in the recent Liquor Prohibition Appeal, 1895,[1] Lord Herschell remarks that in cases where Parliament has legislated under its general power of legislation, as distinguished from the enumerated powers,[2] there may be nothing to prevent a province supplementing its legislation by legislation in *pari materiâ* to meet the special wants of that particular locality. He says:—"Supposing that the Dominion parliament thought that certain regulations were necessary for the peace, order, and good government of Canada, and supposing that in a particular province a state of things existed which rendered it unsafe for the public that regulations so little stringent should exist, that is to say, that it would

Provinces may supplement Dominion law.

[1] Printed transcript from Marten & Meredith's notes at pp. 165-7. See p. 398, n. 1, *supra*.

[2] See pp. 437-8, *supra*.

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be necessary that some further and more stringent regulations should be in force if peace was to be maintained there, then it does not follow that because the parliament of Canada considered that for the Dominion generally you must at least do this, that the provincial legislature could not, as a merely local matter where the locality needed something much more drastic, so legislate. I do not see why not. It is a merely local matter. They do it for their locality, and it affects it only. It may be the legislature in question think it proper, not for the whole Dominion, but for their locality; and what is the inconsistency between these two acts of legislation? . . . Take sanitation, for example. Supposing that the Dominion parliament had, with a view to the health of the whole Dominion, passed certain regulations, and supposing in a particular province a particular disease was raging which rendered it necessary for the safety of all those within the province that much more stringent regulations as to the inhabitants of the houses should come into force, why should not that be considered a merely local matter? If it is so, it is intended to be dealt with, and you limit your regulation to the locality; and why is that inconsistent with legislation which is[1] on the same lines as that which is in force in the Dominion at large? . . . One cannot help having certain doubts as to whether the parliament of Canada could legislate as regards the sanitary arrangements of houses in a particular town in a province under this general power for the peace, order, and good government of Canada, which must mean Canada at large, in general . . . It is difficult to suppose that the parliament of Canada

And provide thus for special wants of special localities.

Sir Farrer Herschell.

[1] Probably this should read for "if the legislation is," or words to that effect.

could legislate for what may be a temporary measure required to meet a local exigency at a particular time, in a particular town in a province, and if the parliament of Canada cannot legislate, it is very difficult to suppose that the provincial parliament cannot, and that there is no power of legislation about it at all, because all legislative power was intended to be in one or other of the provinces."[1] Prop. 44

[1]See Proposition 51 and the notes thereto.

PROPOSITION 45.

45. The Dominion Parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion, whether they be officials of Provincial Courts,[1] other officials, or private citizens; and there is nothing in the British North America Act to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers, as to matters which do not come within the subjects assigned exclusively to the legislatures of the Provinces, [or to deprive them of jurisdiction over such matters]; and so, also, it would appear that in matters within their sphere Provincial Legislatures can impose duties upon Dominion officials in certain cases.

The broad general words of the first clause of the above Proposition are derived from those of Dorion,

[1] As to what are 'Provincial Courts,' see letter of Mr. Alphens Todd, in 18 C.L.J. at p. 181, commenting on the Thrasher Case, 1 B.C. (Irving) 156; also a series of articles on Provincial Jurisdiction over Civil Procedure, in 2 C.L.T., esp. at pp. 366-9, 410, and 456, *et seq.*

C.J., in the case of Bruneau *v.* Massue,[1] as quoted with approval by Meredith, C.J., in Valin *v.* Langlois,[2] where he speaks of the right of the Dominion to impose the burden of trying contested elections upon provincial Courts, and the further authorities to be cited seem to render them unquestionable. In the report of the case of Bruneau *v.* Massue, in 23 L.C.J., however, the precise passage quoted by Meredith, C.J., does not appear, but Dorion, C.J., is represented as saying:—"The judges of the Superior Court as citizens are bound to perform all the duties which are imposed upon them by either the Dominion or the local legislature. If these duties were either incompatible or too onerous to be properly performed, provided neither legislature had exceeded the limits of its legislative power, it would become the duty of the local and Dominion governments to suggest a remedy by some practical solution of the difficulty, but it does not devolve upon the Courts of Justice to assume the authority of declaring unconstitutional a law on account of the real or supposed inconveniences which may result in carrying out its provisions."

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Dominion authority over judges of provincial Courts.

The second clause of the leading Proposition with the exception of the concluding words in brackets is from the judgment of the Privy Council in the above case of Valin *v.* Langlois,[3] where their lord-

[1] 23 L.C.J. at p. 60, (1878). See also, in connection with this Proposition, an article on Federal License Commissioners as affected by the Municipal Act of Ontario, 3 C.L.T. 319. Also some remarks in 11 L.N. at pp. 349-50, on the question of the expediency of vesting Dominion or federal judicial powers in provincial Courts.

[2] 5 Q.L.R. at p. 16, 1 Cart. at p. 231, (1879).

[3] 5 App. Cas. at p. 120, 1 Cart. at p. 164, (1879). As to this case reference may also be made to Todd's Parliamentary Government in the British Colonies, 2nd ed., at p. 542, *et seq.* As to the provincial appointment of election judges for the trial of contested municipal elections, see Crowe *v.* McCurdy, 18 N.S. 301, (1885).

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ships refused leave to appeal from the judgment of the Supreme Court of Canada, wherein the judges had held unanimously that the Dominion Controverted Elections Act, 1874, 37 Vict., c. 10, D., which conferred upon the provincial Courts jurisdiction with respect to controverted elections to the Dominion House of Commons was valid,[1] and clearly recognized, (in opposition to the view expressed by Wilson, C.J., in *Re* Niagara Election Case,[2] but in accordance with that expressed by Ritchie, C.J., and Fournier, Henry, and Taschereau, JJ., in the Court below),[3] the right of the Dominion parliament to commit the exercise of a new jurisdiction to provincial Courts as to matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces.[4]

Dominion may give new jurisdiction to provincial Courts.

As Ritchie, C.J., says,[5] were it otherwise, " in no case could the Dominion parliament invoke the powers of these Courts to carry out their enactments

[1] For other prior decisions in reference to the same matter, see *supra* p. 349, n. 1.

[2] 29 C. P. 261, at pp. 293-4, (1878).

[3] See 3 S.C.R. at pp. 18, 20-2, 38, 50, 64, 74, 1 Cart. at pp. 174, 175-7, 189, 200, 207.

[4] See 5 App. Cas. at p. 119, 1 Cart. at p. 163. At the same time they say, referring to the language of the Act in question :—" Words could not be more plain than those to create this as a new Court of record, and not the old Court with some superadded jurisdiction to be exercised as if it had been part of its old jurisdiction": 5 App. Cas. at p. 121, 1 Cart. at p. 165. There is a point of distinction here between our constitution and that of the United States, where Congress cannot vest jurisdiction in State Courts, nor the State legislatures give jurisdiction to the Federal Courts. Wilson, J., in the Niagara Election Case, 29 C.P. at pp. 293-4, and Meredith, J., in Valin *v.* Langlois, 5 Q.L.R. at p. 11, 1 Cart. at p. 227, took the view that our constitution was analogous to the American in this respect, and that the Federal parliament could not exercise any rights whatever over provincial Courts. But see per Fournier, J., in Valin *v.* Langlois, 3 S.C.R. at p. 55, 1 Cart. at p. 193.

[5] 3 S.C.R. at pp. 20-2, 1 Cart. at pp. 175-7.

in the manner they having the legislative right to do so, may think it just and expedient to prescribe. . . The statutes of Parliament, from its first session to the last, show that such an idea has never been entertained by those who took the most active part in the establishment of Confederation." And he goes on to cite a number of instances, amongst others the Railway Act of 1868, 31 Vict., c. 68, s. 9, s-s. 15, whereby the duty of appointing arbitrators is imposed upon the judges of one of the Superior Courts in the province in which the place giving rise to the disagreement is situated; and the Insolvency Acts of 1869 and 1870, whereby, in Nova Scotia, an entirely new jurisdiction was given in insolvency to the probate Courts, or judges of probate, which they never in any way before possessed.[1]

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Examples of this.

In the same part of his judgment, Ritchie, C.J., says, referring to section 129 of the British North America Act:—"They," (*sc.*, the provincial Courts), "are the Courts which were the established Courts of the respective provinces before Confederation, existed at Confederation, and were continued with all laws in force, 'as if the Union had not been made,' by the 129th section of the British North America Act, and subject, as therein expressly provided, 'to be repealed, abolished or altered by the parliament of Canada, or

B.N.A. Act, s. 129.

[1] And see per Henry, J., S.C., 3 S.C.R. at p. 69, 1 Cart. at p. 203, and the words of Johnson, J., in Ryan *v.* Devlin, 20 L.C.J. at pp. 83-4, (1875), may be referred to. In the recent British Columbia case of Piel Ke-ark-an *v.* Reginam, 2 B.C. (Hunter) at p. 76, (1891), Drake, J., observes, that although the legislature of the Dominion has power to impose on the judges additional duties, "these additional duties must be performed within the limits of the judicial districts to which the judges are appointed; any other contention would interfere with the power of appointment of the judges vested in the Governor-General by section 96 of the British North America Act"; but it is submitted that the Dominion parliament by an Act assented to by the Governor-General could certainly exercise any powers vested in the latter. See, *supra*, at pp. 90-2, 176, *et seq.*, 193.

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by the legislature of the respective province, according to the authority of the Parliament, or of that legislature under this Act.' They are the Queen's Courts bound to take cognizance of and execute all laws whether enacted by the Dominion parliament or the local legislatures, provided always such laws are within the scope of their respective legislative powers." And others of the judges of the Supreme Court refer in this case in like manner to section 129.[1]

Dominion selection of provincial officers to enforce its laws.

In *Ex parte* Perkins,[2] Allen, C.J., delivering the judgment of the Supreme Court of New Brunswick, observes that :—"In matters within the power of the Dominion parliament, it has power to declare by what Courts or officers its laws shall be enforced," referring to Valin *v.* Langlois. And so it was held in that case that section 103 of the Canada Temperance Act, which purported to give Parish Court Commissioners in New Brunswick, (officials appointed under an Act of the provincial legislature with civil jurisdiction), power to adjudicate in prosecutions for violations of that Act, was *intra vires*. And this decision was followed in the subsequent New Brunswick case of *Ex parte* Porter,[3] where it was held that the Dominion parliament can empower magistrates, appointed by the provincial government, to hear informations under the Summary Convictions Act for violations of Dominion statutes, as per R.S.C., c. 178, s. 10. In which case Allen, C.J., (at pp. 592-3), with whom Wetmore and King, JJ., concurred, seems to indicate the view that though the Dominion parliament had the right to make use

[1] See further as to this section, Proposition 30 and the notes thereto.

[2] 24 N.B. at p. 70, (1884).

[3] 28 N.B. 587, (1889).

of provincial magistrates for the purpose of enforcing the law, where the provincial legislature, as in the case before him, had not authorized the constitution of any Court to try such offences, yet that if the provincial legislature had established such a Court, the Dominion parliament would have had either to make use of that Court or establish a Dominion Court under section 101 of the British North America Act, but could not select some other provincial Court in lieu of the one so established by the provincial legislature.[1]

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B.N.A. Act, s. 101.

In Attorney-General of Canada *v.* Flint,[2] the Supreme Court of Canada held that section 156 of the Inland Revenue Act, 31 Vict., c. 8, which enacts that all penalties and forfeitures incurred under that Act, or any other law relating to excise, may be prosecuted, sued for, and recovered in the Court of Vice-Admiralty having jurisdiction in that province of Canada where the cause of prosecution arises, is on the principles laid down in Valin *v.* Langlois,[3]

Dominion power over Imperial Vice-Admiralty Court.

[1] As to section 101 of the British North America Act, the opinion is expressed in an article on the Constitution of Canada, in 11 C.L.T. at p. 147, that by 'the laws of Canada' for the better administration of which Parliament may under it establish additional Courts, must be understood not merely laws passed by that Parliament, but "laws in force in Canada whether originating at common law, in the Imperial or Canadian parliaments, or provincial legislatures." The writer cites in support the remarks of the Judicial Committee on the motion for leave to appeal in McLaren *v.* Caldwell, as reported 3 C.L.T. 343. He seems, however, to have misread the remarks of the Board which have reference to the jurisdiction of the Supreme Court of Canada as a general Court of Appeal for Canada, established under the prior part of section 101, rather than to that part of the section relating to the establishment of any additional Courts for the better administration of the laws of Canada. And see also as to this section an article on Provincial Jurisdiction over Civil Procedure, in 2 C.L.T. at p. 513; also Farwell *v.* The Queen, 14 S.C.R. 392, where it was held that under it the Dominion parliament has power to give jurisdiction to the Exchequer Court in actions where the Crown in right of the Dominion is plaintiff or defendant: The Picton, 4 S.C.R. 648, 1 Cart. 557, (1879); Forristal *v.* McDonald, Cas. Sup. Ct. Dig. 406, 4 Cart. at p. 441, n., (1882); Clarkson *v.* Ryan, 17 S.C.R. at pp. 253-4, 4 Cart. at p. 440, (1890).

[2] 16 S.C.R. App. at p. 707, 4 Cart. 288, (1884).

[3] 5 App. Cas. 115, 3 S.C.R. 1, 1 Cart. 158, 167.

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intra vires of the Dominion parliament, and that the fact that the Vice-Admiralty Court at Halifax was an Imperial Court, established under Imperial authority, made no difference, although Strong and Henry, JJ., express the view that the Court of Vice-Admiralty might, if it saw fit, decline the jurisdiction conferred upon it by the legislature of the Dominion. The Court appealed from, the Supreme Court of Nova Scotia,[1] had held the other way on the ground that the Imperial legislature "never contemplated, in clothing Parliament with power to make laws for the government of Canada, that it should pass an Act conferring a new jurisdiction upon the British Vice-Admiralty Court, and require that Court without further Imperial legislation to adjudicate upon such a matter as this collection of a penalty." Weatherbe, J., delivering the judgment of the Court, observes, (at p. 460):— "I suppose if the province were to assign the recovery of a penalty for breach of one of its own laws on a subject within its exclusive power to the Vice-Admiralty Court, that would be the same question that is now before us."[2] It also appears from this judgment that the judge of the Vice-Admiralty Court at Halifax, Sir W. Young, (who held that he had jurisdiction, and appears, indeed, to have thought that the Imperial Act governing the practice and proceedings of his Court itself required him to adjudicate on breaches of all revenue laws in force in the Dominion), in giving judgment said:— "Much was said at the argument of the power of the Dominion legislature over this as an Imperial Court, and no doubt if a Dominion Act were to

Dominion power over Imperial Vice-Admiralty Court.

[1] 3 R. & G. 453, (1882).

[2] See Proposition 17 and the notes thereto.

attempt to give this Court a jurisdiction analogous to that of Admiralty Courts in the United States, and exceeding that of the High Court of Admiralty in England, I would have no difficulty in holding that such an Act was *ultra vires ;* but it is very certain that no such Act will ever pass." But Weatherbe, J., says as to this,[1] that his Court considered that this admission, if good law, was fatal to allowing the jurisdiction of the Vice-Admiralty Court in the case before them, which must be allowed, if at all, " not on account of any power it derived by virtue of its being an Imperial Court, and thereby having jurisdiction over the general subject of inland revenue," but "on the broad ground that the parliament of the Dominion is not to be limited in organizing, adopting, or selecting its tribunal or procedure for the trial of any matter over which it has exclusive right to legislate, that its power is not even to be confined to creating new Courts, or clothing established provincial tribunals with any authority it sees fit, but that it may require any Imperial Court having jurisdiction of any kind in this country—and even in one province of the Dominion—to exercise jurisdiction of another kind altogether, and adopt a new procedure, and hear evidence which in no other case would be heard, and even to impose a duty on the war and naval authorities on this station requiring, for instance, the Courts,—Courts Martial, —which have been erected by the Imperial power for particular purposes, to try offences against regulations of the service,—to try questions of Canadian militia, revenue, or shipping."

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Dominion selection of its own tribunals.

The words of our leading Proposition as to depriving provincial Courts of jurisdiction are sug-

[1] 3 R. & G. at p. 461.

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gested by the passage in the judgment of Taschereau, J., in this case of Valin *v.* Langlois,[1] where he says:—"I think that to decide that the federal Parliament can never or in any way add to or take from the jurisdiction of the provincial Courts would be curtailing its powers to an extent perhaps not thought of by the appellant, and that it would destroy, in a very large measure, the rights and privileges which are given to the federal power by sections 91 and 101 of the Act. I take, for one instance, the criminal law. The constitution, maintenance, and organization of provincial Courts of criminal jurisdiction, is given to the provincial legislatures, as well as the constitution, maintenance, and organization of Courts of civil jurisdiction, yet cannot Parliament in virtue of section 101 of the Act[2] create new Courts of criminal jurisdiction, and enact that all crimes, all offences, shall be tried exclusively before these new Courts? I take this to be beyond controversy." Later on,[3] passing to civil laws as distinguished from criminal laws, the learned judge says:—"I see in the British North America Act many instances where Parliament can alter the jurisdiction of the provincial civil Courts. For instance, I am of opinion that Parliament can take away from the provincial Courts all jurisdiction over bankruptcy and insolvency, and give that jurisdiction to Bankruptcy Courts, established by such Parliament. I also think it clear that Parliament can say, for instance, that all judicial proceedings on promissory notes and bills of exchange shall be taken before the Exchequer

Dominion power to deprive provincial Courts of jurisdiction;

And establish special Courts.

[1] 3 S C.R. at p. 74, 1 Cart. at p. 207.

[2] See as to this section, *supra* p. 515, n. 1.

[3] 3 S.C.R. at p. 76, 1 Cart. at p. 208.

Court or before any other Federal Court.[1] This would be certainly interfering with the jurisdiction of provincial Courts. But I hold that it has the power to do so *quoad* all matters within its authority. So it has the power, and it has done so by the Public Works Acts, to enact that the moneys due on expropriations by the Crown shall be deposited in the provincial Courts, and to order and regulate how these Courts are to distribute such moneys. I read sub-section 14 of section 92 of the British North America Act as having no bearing on the jurisdiction of the Courts in the matters not left to the provincial legislature."[2]

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B.N.A. Act, s. 92, No. 14.

And in *Re* North Perth, Hessin *v.* Lloyd,[3] it was held by the Ontario Chancery Divisional Court, over-ruling *Re* Simmons & Dalton,[4] that, whereas in the Electoral Franchise Act, the Dominion parliament had committed the whole matter of the registration of parliamentary voters (one essentially within its own power and control) to a body of public functionaries called revising officers, appointed by the Governor-in-Council, while there was nothing in the Act to give any indication of an intention that provincial Courts were to have any jurisdiction, power, or control over any of the proceedings under the Act, or the revising officer, there was no jurisdiction in the High Court of Justice to control by prohibition the revising officer. As Meredith, J., says, (at p. 546):—"This provincial Court is asked to exercise a controlling jurisdiction over a purely federal

Dominion revising officers.

[1] But see *supra* at pp. 441-2.

[2] See *supra* p. 440.

[3] 21 O.R. 538, (1891).

[4] 12 O.R. 505, (1886).

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Court established, under the authority of the British North America Act, 1867, for the better administration of the laws of Canada pertaining solely to the representation of the people in the House of Commons, a matter entirely beyond any provincial right or control, a jurisdiction neither expressly nor impliedly conferred, but rather by implication excluded"; while Boyd, C., (at p. 542), takes occasion to observe that the right of voting is not an ordinary civil right; it is historically and truly a statutory privilege of a political nature, and the right of voting for the Dominion House of Commons "falls within the category, not of civil rights in the province, but of electoral rights in Canada." And the words of Killam, J., in Canadian Pacific R. W. Co. *v.* Northern Pacific, etc., R.W. Co.,[1] as to the Railway Committee of the Privy Council as the tribunal empowered to decide certain matters by the general Railway Act of Canada, 51 Vict., c. 29, D., may be referred to:—"The Railway Committee may be considered by some not to be a satisfactory tribunal. If Parliament should so determine, probably another will be substituted, but in the meantime it is the one which must determine such question so far as the Dominion parliament could bestow jurisdiction."[2]

Provincial Courts cannot control Dominion tribunals.

[1] 5 M.R. at p. 313, (1888). The subject of Provincial Jurisdiction over Civil Procedure is discussed at length in a series of able articles in Vol. 2 of the *Canadian Law Times*. At p. 367, the writer says:—"Wherever those Courts," (*sc.*, the provincial Courts), "are utilized for the purpose of enforcing rights respecting any of the subjects within the legislative jurisdiction of the Dominion, the litigant must in the absence of a special forum and a special mode of procedure devised by the parliament of Canada conform to the practice of the provincial Courts."

[2] See *supra* pp. 441-6. In the same way in the matter of a provincial Act of Quebec which amended the law respecting railways in that province by empowering the Lieutenant-Governor in Council upon the report of the Railway Committee of the Executive Council to cancel the charter of any railway company incorporated under the

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The cases of Hart *v.* The Corporation of the County of Missisquoi,[1] Cooey *v.* The Municipality of the County of Brome,[2] and The Township of Compton *v.* Simoneau,[3] suggest the possibility of powers and functions being conferred upon municipal corporations, either by the legislature of the late province of Canada, or by the Dominion parliament, in respect to matters not of provincial competency under the British North America Act. In the case of Cooey *v.* The Municipality of the County of Brome,[4] Dunkin, J., observes :—"Each provincial legislature, alone, can create municipalities, properly so called, establish their functionaries, and assign them their proper duties and their powers, but always within the limits of its own. Whether or not it can render them incapable of other duties and powers, to be delegated by Parliament, is a question that need not here be considered. . . And as to all powers, not of provincial competency, so to speak,

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laws of the province in certain cases, Sir John Thompson, as Minister of Justice, in his report of March 24th, 1891, (Hodgins' Provincial Legislation, 2nd ed. at p. 439), observes :—"It may be objectionable, as it transfers to the Railway Committee of the Executive Council of the Province powers, functions, and responsibilities which are generally reposed by legislation in legal tribunals, and does not establish the safeguards which legal procedure possesses, but it seems clear that a legislature may invest other bodies than the Courts with such powers and functions without exceeding its jurisdiction." It will be observed that the Minister is here speaking of the power of the provincial legislature to create a special tribunal for the determination of a special matter, and not of the power to confer general jurisdiction. As to the latter, and as to the powers of the Governor-General in respect to the appointment of judges under section 96, see Proposition 8 and the notes thereto, especially at p. 136, *et seq.*; also see *supra* p. 457, n. 2, in connection with which cf. Ross *v.* The Canada Agricultural Insurance Co., 5 L.N. 22, (1882).

[1] 3 Q.L.R. 170, 2 Cart. 382, (1876).

[2] 21 L.C.J. 182, 2 Cart. 385, (1872).

[3] 14 L.N. 347, (1891). See these cases also referred to *supra* pp. 368-70.

[4] 21 L.C.J. at p. 186, 2 Cart. at p. 388, (1877). Cf. Clement's Law of the Canadian Constitution at p. 444.

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which they may hold under antecedent delegation of the unlimited legislature of the late province of Canada, these can be resumed or altered by Parliament alone."[1] It is submitted that provincial legislatures could no more interfere in the former case than in the latter. And in *In re* Prohibitory Liquor Laws,[2] Sedgewick, J., says:—"Regulations made by Dominion law as well as by local law must be enforced by some sort of machinery. Parliament, I think, may use existing municipal machinery for this purpose; may in respect to those subjects committed to it, such, *e.g.*, as weights and measures, the fisheries inspection, navigation, etc., give to municipal councils power to make by-laws."[3]

Dominion use of municipal machinery

The concluding words of the leading proposition under discussion are supported by the decision of the Ontario Court of Queen's Bench in *In re* Wilson *v.* McGuire.[4] In that case it appeared that an Ontario statute had provided that two or more counties might be grouped together by the Lieutenant-Governor for judicial purposes therein specified, and conferred on the County Court judges of grouped counties the same authority to try suits in each of the grouped counties as they possessed in their own counties respectively. There had been prior to Confederation, and since, in each county in Ontario, Division Courts for the trial of small causes, and these

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[1] As to this latter point see Proposition 30 and the notes thereto.

[2] 24 S.C.R. at p. 247, (1885).

[3] And that Parliament may in certain cases exercise legislative power over municipal corporations, see *supra* p. 446.

[4] 2 O.R. 118, 2 Cart. 665, (1883). In Belanger *v.* Caron, 5 Q.L.R. at pp. 31-2, Stuart, J., asks:—"If the Dominion parliament can create a new jurisdiction in a provincial Court, what will prevent a provincial legislature from imposing a jurisdiction on a Dominion Court? The prohibition to make certain laws attaching to all these legislatures springs from the same source, is couched in the same language, and is mutual and reciprocal." See as to this case, *supra* p. 349, n. 1.

had always been presided over by County Court judges, who since Confederation are appointed by the Governor-General under section 96 of the British North America Act; and on the authority of the above Ontario Act, the County judge of the County of Lambton had assumed to exercise jurisdiction in the Division Court of the County of Middlesex. The Court of Queen's Bench held that the provincial legislature having complete jurisdiction over the Division Courts could appoint the officers to preside over them, and that the Ontario enactment was valid, and Hagarty, C.J.O., observes[1]:—"I do not feel that in the case before me any difficulty is created by the fact of the judge of Lambton being an officer appointed by the Dominion expressly for that county. It was urged that he could not perform judicial duties beyond its limits. It is sufficient here to say that he has in fact performed them under the authority of the provincial legislature, and that the latter having complete power over the Division Courts, have designated him, among other named functionaries, to preside in the Court, and that he so presided."

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In Gibson *v.* McDonald,[2] O'Connor, J., held that a provincial legislature cannot "clothe the judge of a County Court, who has been duly appointed for that county, with the powers and authority of a judge of the County Court in other counties, which are not included in his commission."[3] But

[1] 2 O.R. at pp. 124-5, 2 Cart. at p. 672. See this case also referred to, *supra* pp. 136-7.

[2] 7 O.R. at p. 419, 3 Cart. at p. 328, (1885).

[3] From these two last-mentioned cases of *In re* Wilson *v.* McGuire, and Gibson *v.* McDonald, Mr. Clement, in his work on the Law of the Canadian Constitution, (p. 233), deduces the proposition that:—"A provincial government can impose upon the individual who is County Court judge, duties, (falling of course within the range of matters of

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in the recent case of *In re* County Courts of British Columbia,[1] the Supreme Court of Canada decided that the legislature of British Columbia had power, under No. 14 of section 92 of the British North America Act, whereby provincial legislatures are empowered to make laws regarding the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts, to enact, as they had done, that a County Court judge appointed for one district, might, under certain circumstances in the Act mentioned, act as judge in another district, and also that until a County Court judge of Kootenay had been appointed, the judge of the County Court of Yale should act as such, and have while so acting, whether sitting in the County Court district of Kootenay or not, "all the powers

B.N.A. Act, s. 92, No. 14.

provincial cognizance), other than those covered by his commission from the Governor-General, care being necessary, perhaps, in defining that those super-added duties are when exercisable otherwise than in his own county,—to be exercised by him, not *qua* County Court judge, but *qua* provincial officer." The subject is also discussed in 3 C.L.T. at pp. 20, 81, 145, where referring to the Ontario enactment, R.S.O., 1887, c. 47, s. 19, under which County Court judges act as judges of the Division Courts, it is said, (at p. 20):—"These judges act under a statutory commission, just as the Superior Court judges act in election cases, under the statutory commission of the Controverted Election Act: see Valin *v.* Langlois, 3 S.C.R. 1." In his report to the Governor-General, of November 2nd, 1895, (Hodgins' Provincial Legislation, 2nd ed. at p. 244, b.), referring to section 185 of the Ontario Judicature Act, 1895, 58 Vict., c. 12, Sir C. H. Tupper, as Minister of Justice, says:—"The practice has hitherto been, where a provincial legislature has constituted the office of local judge of a Superior Court, and declares that the County Court judges shall exercise the jurisdiction conferred upon such local judges, for your Excellency to issue commissions to such County Court judges, appointing them to the office which under the provincial statute they are qualified to fill. The section in question appears to be merely a re-enactment of a previous one, and if the practice formerly existing be continued, there could be no doubt as to the authority of judges so appointed to exercise the jurisdiction which is intended to be conferred." See, also, *supra* pp. 124-7, 164, n. 1.

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[1] 21 S.C.R. 446, (1872); Brit. Col. Sess. Pap., 1893, pp. 298-93.

and authorities that the judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect to such actions, suits, matters, and proceedings," and that the two County Court districts should, for the purpose of this enactment, but not further or otherwise, be united.[1] Prop. 45

[1] In the case of Peil Ke-ark-an *v.* Reginam, 2 B.C. (Hunter) 53, (1891), Begbie, C.J., and Walkem and Drake, JJ., had shortly before decided that the latter enactment authorizing the County Court judge of Yale to act in the Kootenay County Court district was *ultra vires* as virtually amounting to an appointment by them of a judge for the County Court of Kootenay in contravention of section 96 of the British North America Act. On the other hand, in Crowe *v.* McCurdy, 18 N.S. 301, (1885), the Supreme Court of Nova Scotia had decided that the jurisdiction of County Court judges does not depend upon their commissions, which are only descriptive of the tribunal over which such judges are appointed to preside, but upon enactments of the provincial legislature, which may define, enlarge, and extend the districts within which the judges sit as it sees fit. In *In re* County Courts of British Columbia, 21 S.C.R. at p. 453, Strong, J., uses language which does not seem reconcilable with the decision of the Privy Council in Valin *v.* Langlois, 3 App. Cas. at p. 119, 1 Cart. at p. 163; see *supra* pp. 511-13. He says :—"The jurisdiction of Parliament to legislate as regards the jurisdiction of provincial Courts is, I consider, excluded by sub-section 14 of section 92 above referred to, inasmuch as the constitution, maintenance, and organization of provincial Courts plainly includes the power to define the jurisdiction of such Courts territorially as well as in other respects. This seems to me too plain to require demonstration. Then, if the jurisdiction of the Courts is to be defined by the provincial legislatures that must necessarily also involve the jurisdiction of the judges who constitute such Courts." On the other hand, the language of Begbie, C.J., in The Attorney-General of British Columbia *v.* The City of Victoria, 2 B.C. (Hunter) at p. 2, (1890), is surprising, where he says: —"There is no doubt but the Dominion legislature can alter, abridge, and enlarge the jurisdiction of this Court, as it has done on several occasions," referring as he is not to jurisdiction to administer Dominion laws, but to the power of the Dominion parliament to enact that where the question of the validity of an Act of the provincial legislature was raised on the pleadings it should be reserved for the sole decision of the Supreme Court of Canada.

Provincial Acts as to County Court judges.

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46. Where in respect to matters with which Provincial Legislatures have power to deal, provincial legislation directly conflicts with enactments of the Dominion Parliament,—whether the latter immediately relate to the enumerated classes of subjects in section 91 of the British North America Act, or are only ancillary to legislation on the said classes of subjects, or are enactments for the peace, order, and good government of Canada, in relation to matters not coming within the classes of subjects assigned exclusively to the Provincial Legislatures, nor within the said enumerated classes of section 91,—the provincial legislation must yield to that of the Dominion Parliament.

As recently as the year 1885, in the argument before the Privy Council in the Matter of the Dominion License Acts of 1883-4,[1] Mr. Haldane, who was of counsel in the case, observed that the question how a particular section of an Act which is within the competency of one legislature is to be reconciled with a particular section of an Act which is within the competency of another, where

[1] Printed transcript from Marten & Meredith's shorthand notes, at p. 149.

they incidentally clash, had not yet been before the Board for determination. However, the rule embodied in the leading Proposition has now been clearly established by the Privy Council in the three recent cases of Tennant *v.* The Union Bank,[1] Attorney-General of Ontario *v.* Attorney-General of Canada,[2] and The Liquor Prohibition Appeal, 1895.[3] As Strong, C.J., observes in Huson *v.* The Township of South Norwich[4]:—"Although the British North America Act contains no provisions declaring that the legislation of the Dominion shall be supreme, as is the case in the constitution of the United States, the same principle is necessarily implied in our constitutional Act."[5]

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Recent Privy Council decisions.

[1][1894] A.C. 31.

[2][1894] A.C. 189.

[3]Attorney-General of Ontario *v.* The Attorney-General for the Dominion of Canada, and The Distillers and Brewers' Association of Ontario, [1896] A.C. 348.

[4]24 S.C.R. at p. 149, (1895).

[5]In the course of the argument before the Supreme Court in the Matter of the Dominion License Acts, 1883-4, he had observed:—"The American Constitution provides that as Congress is the supreme law of the land, the State law must withdraw and give place to it; but where do you find anything of that kind here? If the law of the provinces is good *ab initio*, it is good forever. There is nothing to say that the law of Parliament shall be paramount": Dom. Sess. Pap., 1885, No. 85, pp. 218-9. The provision in the Constitution of the United States referred to is Article 6, section 2:—"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." On the second reading of the British North America Act in the House of Lords, Lord Carnarvon said:—"The authority of the central parliament will prevail whenever it may come into conflict with the local legislatures:" Hans., 3rd Ser., Vol. 185, at p. 566; words which are quoted in the Thrasher Case, 1 B.C. (Irving) at p. 202, (1882); and in Griffith *v.* Rioux, 6 L.N. at p. 214, 3 Cart. at p. 356, (1883). See, also, Debates before Confederation in the Parliament of Canada at p. 42; and the despatch of Lord Monck to the Secretary of State, of November 7th, 1864: Can. Sess. Pap., 1865, Vol. 3, No. 12. And for further citations in general support of the leading Proposition, see per Ritchie, C.J., in Citizens Insurance Co.

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The first two of these cases have already been sufficiently noticed in regard to this matter.[1] In The Liquor Prohibition Appeal, 1895, their lordships again refer to it, and say[2]:—"It has been frequently recognized by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act, the enactments of the parliament of Canada, in so far as these are within its competency, must over-ride provincial legislation." And passing to the consideration of the question whether the enactments of the Ontario Liquor License Law, 53 Vict., c. 56, s. 18, O., to any, and, if so, to what extent, came into collision with the provisions of the Canada Temperance Act, 1886, they say :—"In so far as they do, provincial must yield to Dominion legislation, and must remain in abeyance unless and until the Act of 1886 is repealed by the Parliament which passed it. . . For the same reason provincial prohibitions in force within a particular district will necessarily become

The Liquor Prohibition Appeal, 1895.

v. Parsons, 4 S.C.R. at p. 242, 1 Cart. at p. 292, (1880); per Fournier, J., S.C., 4 S.C.R. at pp. 273-4, 1 Cart. at p. 304; per Gwynne, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 562, 2 Cart. at pp. 54-5, (1880); per Ritchie, C.J., S.C., 3 S.C.R. at pp. 540-2, 2 Cart. at pp. 38-40, as to which and the Dominion control of trade and commerce see the notes to Proposition 49; per Ramsay, J., in Three Rivers *v.* Sulte, 5 L.N. at p. 333, 2 Cart. at p. 287, (1882); per Crease, J., in Regina *v.* Wing Chung, 2 B.C. (Irving) at p. 164, (1885); per Hagarty, C.J.O., in *Re* Local Option Act, 18 O.A.R. at p. 580, (1891). Thus the words of Burton, J.A., (S.C. at pp. 589-90), are clearly overborne by authority where he says, after referring to the exclusiveness of the legislative powers under the British North America Act, except in the two cases provided for by section 95 :—"There is, in my opinion, no general rule or principle, and no ground for the contention that I have sometimes heard advanced, that in case of conflict the legislation of the Dominion must prevail; on the contrary, there can be no such conflict. Each is supreme upon the subjects entrusted to it, and it was assumed in the Imperial Act that there could be no conflict except in the two enumerated cases."

[1] See *supra* pp. 427-30.

[2] [1896] A.C. at pp. 366-7, 369.

inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district." Prop. 46

Thus it is no longer matter of doubt whether it makes any difference if the provincial enactment be prior in date to the conflicting Dominion enactments. In L'Union St. Jacques de Montreal *v.* Belisle,[1] the Privy Council had repudiated the view that a local legislature was incapacitated from enacting a law otherwise within its proper competency merely because the Dominion parliament might under section 91 of the British North America Act, if it saw fit so to do, pass a general law which would embrace within its scope the subject-matter of the local Act, but had stated[2] that they were by no means prepared to say that if any such law has been passed by the Dominion parliament, it would be within the competency of the provincial legislature afterwards to take the subject-matter of the local Act out of the scope of the general law so competently passed by the Dominion parliament; and upon the argument in the Matter of the Dominion License Acts, 1883-4,[3] these *dicta* in L'Union St. Jacques de Montreal *v.* Belisle, being under discussion, Lord Monkwell, one of the Board, is reported as saying in reference to them :—"It is intimated that if the Dominion parliament had occupied the ground before, then the local government could not occupy it. But supposing the local government first occupied the ground?" Whereupon the following remarks took place between him

Provincial law placed in abeyance by Dominion law.

[1] L.R. 6 P.C. 31, 1 Cart. 63, (1874). See Proposition 62 and the notes thereto.

[2] L.R. 6 P.C. at pp. 36-7, 1 Cart. at pp. 70-1.

[3] Printed transcript from Marten & Meredith's shorthand notes, p. 50.

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and Sir Farrer Herschell, who appeared for the Dominion of Canada :—

Sir Farrer Herschell: "I do not think it can depend upon which is first or last, because if the Dominion parliament can deal with it at all, it is not a matter exclusively committed to the provincial legislature."

Lord Monkwell: "It would follow, if the Dominion parliament could by a general law exclude the local parliament from dealing with the matter, it could, after the local parliament had dealt with it, make it null and void."

Provincial law placed in abeyance by Dominion law.

Sir Farrer Herschell: "Yes, I think it follows because the powers of the Dominion parliament are unlimited, except so far as matters have been exclusively given to the province."

Lord Monkwell: "It may be so. The two things are not quite the same."

Sir Farrer Herschell: "It would not necessarily follow as a matter of reasoning, but on the construction of the two sections."

In their judgment in The Liquor Prohibition Appeal, 1895, the Judicial Committee have now spoken decisively in this matter, as we have seen. At the same time they point out[1] that:—"The Dominion parliament has no authority conferred upon it by the Act to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by section 92. The repeal of a provincial Act by the parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and

[1] [1896] A.C. at p. 366.

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if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be submitted to the judicial tribunals of the country. In their lordships' opinion, the express repeal of the old provincial Act of 1864, by the Canada Temperance Act of 1886,[1] was not within the authority of the parliament of Canada."[2] And so in respect to bankruptcy and insolvency, in *In re* Killam,[3] Savary, Co.J., referring to the Nova Scotia Act for the relief of insolvent debtors, which provided for discharge from prison of a debtor on assignment of his property in trust to pay his debts,[4] says:—"So long as the party seeking the benefit of that chapter has not become insolvent under the Dominion statute, all the proceedings under it are valid and effectual, for they only relate to property and civil rights; but as soon as the Dominion statute on insolvency is invoked that chapter has no more force as to him or his case, and the relief it contemplates can only be obtained under the Dominion statute. He is then in bankruptcy or insolvency within the meaning of the British North America Act, and the Insolvent Act of Canada therefore attaches with exclusive authority upon his person and property. When and where that chapter conflicts or operates inconsistently with the Dominion Insolvent Act of 1869 or 1875 it is superseded, and must be treated as repealed by the concluding clause of section 154 of the former Act or section 149 of the latter. In any

Bankruptcy and Insolvency.

[1] R.S.C., c. 106, ss. 97-98.

[2] See, also, Proposition 29 and the notes thereto.

[3] 14 C.L.J., N.S., at pp. 242-3, (1878).

[4] See Rev. Stats. N.S., 4th Ser., App. A., p. 96. See, also, as to bankruptcy and insolvency, per Sedgewick, J., *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 239, (1895).

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instance where it does not so conflict, and its operation does not become inconsistent with either of those Acts, there is nothing to hinder its provisions being carried out, and *quoad* that case it is as an Act *intra vires*, unrepealed, and by the Dominion parliament unrepealable."[1]

Acts under the general power of Parliament.

And inasmuch as the power to pass the Canada Temperance Act was placed in Russell *v.* The Queen,[2] and in the recent Liquor Prohibition Appeal, 1895,[3] by the Judicial Committee, not under any of the enumerated classes in section 91, but under the general residuary power given to Parliament by that section to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures, it is quite clear from the passages in their judgment in the latter case above quoted that they overruled the contention raised by Mr. Blake in the course of the argument[4] that if, which he disputed, the same subject could be treated by both Parliament and the provincial legislatures under the same aspect, "the only real difference being that in the one case it is treated as within the province, and in the other case as both within and

[1]Cf. per Taschereau, J., in Huson *v.* The Township of South Norwich, 24 S.C.R. at pp. 158, 160, (1895); per King, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 257; per Sedgewick, J., S.C. at p. 250; per Meredith, C.J., in Blouin *v.* Corporation of Quebec, 7 Q.L.R. at p. 21, 2 Cart. at pp. 371-2, (1880). The 45th Quebec Resolution expressly provided:—"In regard to all subjects over which the jurisdiction belongs to both the general and local legislatures, the laws of the general parliament shall control and supersede those made by the local legislature, and the latter shall be void so far as they are repugnant to, or inconsistent with, the former."

[2]7 App. Cas. 829, 2 Cart. 12, (1882).

[3][1896] A.C. 348.

[4]Printed report of this argument, at pp. 246-7: see *supra* p. 398, n. 1.

without the province,"[1] there was not any ground for saying that such Dominion legislation predominated; that "there is a provision that if it is within the enumerated powers it shall predominate, but there is no provision that if it is within the general power it shall predominate."[2] Their lordships hold, in accordance with the concluding words of the leading Proposition, that in such case, as in all others, valid Dominion legislation overrides conflicting provincial enactments.[3] Prop. 46

But this rule would seem to apply, and be only meant to apply, to the case of absolutely conflicting legislation *in pari materiâ*, when it would be an impossibility to give effect to both the Dominion and the provincial enactments. Thus in the Corporation of Three Rivers *v.* Sulte,[4] Ramsay, J., says:—"It is only in the case of absolute incompatibility that the special power granted to the local legislature gives way." And so in Citizens Insurance Co. *v.* Parsons,[5] Fournier, J., says:—"The provincial jurisdiction is only limited by the exercise by the federal parliament of its power in so far as the latter is competent to exercise it, and the province can still exercise its power over that portion of the subject-matter over which it has jurisdiction, provided the provincial legislation does not directly conflict with the federal legislation on a matter within federal jurisdiction." As Proposition 61, *q.v.*, shows, provincial The rule applies only where there is absolute conflict.

[1] See *supra* at pp. 399-401, as to the holding of the Privy Council on this point.

[2] See *supra* at pp. 427-30.

[3] And see per Lord Watson on the argument, at p. 350.

[4] 5 L.N. at p. 333, 2 Cart. at p. 287, (1882).

[5] 4 S.C.R. at pp. 273-4, 1 Cart. at p. 304, (1880). See also per Ritchie, C.J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 542, 2 Cart. at p. 39, (1880).

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legislative power is not to be restricted, or its existence denied, merely because it may limit the range which otherwise would be open to the Dominion parliament.

Dominion Act as to recovery of penalties.

An example of the predominance of Dominion legislation is afforded by the case of Ward *v.* Reed.[1] There a provincial Act enacted that the County Courts should not have jurisdiction over any action against a justice of the peace for anything done by him in the execution of his office. A Dominion Act, however, 32-33 Vict., c. 31, s. 78, which was held to be *intra vires*, provided that penalties against justices of the peace for non-return of convictions might be recovered in an action of debt by any person suing for the same in any Court of Record, and the Court held that such action could be properly brought in a County Court of the province, and that the provisions of the local statute were overridden by the Dominion enactment.[2]

It remains to be mentioned that in certain cases the contention may be raised that provincial powers

[1] 22 N.B. 279, 3 Cart. 405. Desnoyers, J.P.C., specially refers to this case in Pigeon *v.* Mainville, 17 L.N. at p. 72, (1893), where, in reference to the law as to lotteries, he makes some remarks on the subject of the predominance of federal law over provincial in cases of conflict, and concurs in the decision of Dugas, J., in Regina *v.* Harper, R.J.Q. 1 S.C. 327 (1892), (see *supra* p. 401, n. 3), that the federal parliament has jurisdiction over lotteries, such jurisdiction not being one of the matters exclusively assigned to the provinces; but he would seem to have held, nevertheless, that if lotteries had not been made criminal by the Dominion Parliament, as, in fact, they had, the provincial legislature might legalize and permit them under No. 13 of section 92 of the British North America Act "as one of the means of acquiring property or something of that sort," or under No. 16 of that section as a merely private or local matter in the province, but such provincial enactments could have no effect in view of the Dominion Act, 55-56 Vict., c. 29, Art. 205, absolutely forbidding lotteries.

[2] In reference to this case Mr. Clement submits that the Dominion Act can only be held to apply to convictions for offences under Dominion legislation, and can have no application to convictions for offences against provincial laws: Law of the Canadian Constitution, p. 416.

of legislation are restricted or placed in abeyance by the very inaction of the Dominion parliament, or by reason of the fact that the latter has legislated *in pari materiâ*, though conditionally only upon the exercise of local option, which local option has not been exercised in favour of the operation of the Act.[1] Thus in the recent case in reference to the constitutionality of the Ontario Act respecting assignments for creditors[2] Sir Richard Webster argued, though without success, that, inasmuch as after Confederation the Dominion parliament had enacted a complete system of bankruptcy and insolvency, which though in part proceeding *in invitum* against the debtor, yet in other part proceeded upon the basis of a voluntary assignment by the debtor for the benefit of creditors, and in connection therewith contained provisions practically the same as those in the Ontario statute, it had thereby indicated what it regarded as a proper and complete system of bankruptcy and insolvency, and by repealing that system in 1880 it had, in like manner, indicated that its policy was that there should be no such system in operation in the Dominion. It was not after that competent, he argued, for the provinces to re-enact the provisions which had been based upon a voluntary assignment, and which were not merely ancillary to, but formed an integral part of the whole system of bankruptcy and insolvency which the Dominion parliament had seen fit to repeal.[3] And upon the recent Liquor Prohibition Appeal, 1895, Mr. Edward Blake argued in reference to the question of legislative power to

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Inaction of Parliament as affecting provincial power.

[1] See *supra* pp. 349-51.

[2] [1894] A.C. 189.

[3] See a note of this argument in an article on The Privy Council on Bankruptcy, 30 C.L.J. at p. 182.

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prohibit the liquor traffic, in view of the Canada Temperance Act, 1886, that if there were some defeasible power in the provincial legislature of dealing with the matter locally, that power had been defeated, because of the action of the Dominion. "It has," he urged, "decided that the proper way and useful extent of legislation is to provide for prohibition, and for a repeal of it, and for a re-enactment of it, at the intervals, and on the terms and on the conditions which I have stated.[1] These are the methods for grappling with the general evil which the legislature adjudged[2] competent to grapple with it has deemed best. It has not deemed best that greater areas like a whole province should be by one Act of the legislature or by a plebiscite subject to total prohibition. . . Probably it thought that there might be, notwithstanding a majority in the whole province or a preponderance of opinion in the whole province, enormous majorities adverse in local areas, where local public opinion might exist so strongly adverse as to render the Act unworkable, or worse than useless, as we know has occurred in the various cases in which such very drastic legislation has been attempted."[3]

Dominion local option legislation.

However, with reference to this argument, their lordships say[4] :—"Provincial prohibitions in force

[1] That is, by the system of local option provided by the Act.

[2] The reference here, of course, is to the judgment of the Privy Council, in Russell *v.* The Queen, 7 App. Cas. 829, 2 Cart. 12, in reference to the Canada Temperance Act, 1878, the provisions in which, as their lordships declared in their judgment on The Liquor Prohibition Appeal, 1895, [1896] A.C. at p. 362, were in all material respects the same as those embodied in the Canada Temperance Act, 1886.

[3] Printed report of this argument, at pp. 288-9. See *supra* p. 398, n. 1.

[4] [1896] A.C. at pp. 369-70.

within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district. But their lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the Canadian Act are not, and may never be, in force. In a district which has by the votes of its electors rejected the second part of the Canadian Act, the option is abolished for three years from the date of the poll, and it hardly admits of doubt that there can be no repugnancy whilst the option given by the Canadian Act is suspended. But the parliament of Canada has not either expressly or by implication enacted that so long as any district delays or refuses to accept the prohibitions which it has authorized, the provincial parliament is to be debarred from exercising the legislative authority given it by section 92, for the suppression of the drink traffic as a local evil. Any such legislation would be unexampled; and it is a grave question whether it would be lawful."[1]

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Such option, if unexercised, does not fetter provincial powers.

[1] On the argument in the recent case of Fielding *v.* Thomas, [1896] A.C. 600, Lord Watson said :— "I think you may take this as a general proposition, that the provincial legislature cannot be debarred from exercising any of the powers of legislation specified by reason of the ability of the Canadian parliament to deal with the same matters. There is no bar in the way of the provincial parliament until there is legislation by the Dominion parliament": Manuscript transcript from the notes of Cock and Kight, at p. 40. As to the United States Constitution, reference may be made to Story on the Constitution, 5th ed., Vol. 1, at p. 337, *et seq.* See, also, Bryce's American Commonwealth, (2 vol. ed.), Vol. 1, at p. 321.

PROPOSITION 47.

47. Provincial Legislatures have no power to confer jurisdiction or to legislate at all in reference to proceedings taken under a statute of the Dominion Parliament, legislating within the subjects assigned to it by the British North America Act. And a similar limitation applies in the case of the Dominion Parliament in reference to proceedings under provincial statutes. But Provincial Legislatures may legislate in aid and furtherance of Dominion legislation.

Provinces cannot legislate as to proceedings under Dominion Acts;

The first part of this Proposition is suggested by the case of The Queen *v.* De Coste,[1] where Townshend, J., held that the local legislature had no power to confer jurisdiction or to legislate at all in reference to proceedings taken under the Canada Temperance Act, as by conferring authority on the County Court to grant writs of certiorari; that such authority conferred by the local legislature must of necessity be limited to those matters over which it has power to legislate. And so in Regina *v.* Eli,[2] Osler, J.A., seems to clearly indicate the view, (though not necessary to the decision of the case), that it would

[1] 21 N.S. at p. 216, (1888). Cf. Regina *v.* Lake, 43 U.C.R. 515, 2 Cart. 616, (1878).

[2] 13 O.A.R. at p. 533, (1886).

be *ultra vires* of a provincial legislature to confer a right of appeal from a judgment on certiorari quashing a conviction under the Canada Temperance Act. Prop. 47

And quite consistently herewith, and in accordance with the second clause of the Proposition, in Regina *v.* Bittle,[1] it was held to be *ultra vires* of Parliament to enact, as it had done by section 114 and 120 of the Canada Temperance Act, R.S.C., c. 106, that on the trial of any proceeding, matter, or question under any Act in force in any province respecting the issue of licenses for the sale of spirituous liquors the defendant should be competent to give evidence. nor can Parliament as to those under provincial Acts.

As to provincial legislation in aid or furtherance of Dominion legislation, a good example of this is found in License Commissioners of Frontenac *v.* The Corporation of the County of Frontenac,[2] where Boyd, C., held valid a number of Ontario Acts forming a body of legislation relating to municipalities brought under the Canada Temperance Act, by which ways and means were provided for the enforcement of the Act by the application of local funds raised by local taxation or otherwise in the county. "This body of Ontario legislation," he says,[3] "is not in conflict or competition with the provisions of the general law enacted by the Dominion, but in furtherance of it as to its local application and details. Legislation for the well-being of the municipalities in But the provinces may legislate in furtherance of Dominion law.

[1] 21 O.R. 605, (1892). See *supra* p. 464, n. 1.

[2] 14 O.R. 741, 4 Cart. 683, (1887). So, also, License Commissioners of Prince Edward *v.* County of Prince Edward, 26 Gr. 452, (1879). Mr. Clement's objections to these decisions as inconsistent with the decision in Russell *v.* The Queen is not, it is submitted, well founded: Law of Canadian Constitution, pp. 436-7. See *supra* p. 360, n. 1. For examples of concurrent legislation between Canada and the United States, see Todd's Parl. Gov. in Brit. Col., 2nd ed., at pp. 233-4.

[3] 14 O.R. at pp. 747-8, 4 Cart. at p. 688.

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order to the fair and equal enforcement of the prohibitory measures introduced by themselves does not to me appear to be *ultra vires* of the province, even though in one aspect it may be supplementary to the general legislation of the Dominion on the subject. . . . The general prohibitory law, being localized by municipal option, may be enforced through the medium of provincial officers, to be appointed and paid for according to provincial legislation."[1]

[1] A similar decision is *Ex parte* Whalen, 30 N.B. 586, noted *sub nom. Ex parte* Weigman, 11 C.L.T. 182, in reference to a New Brunswick statute of like character authorizing municipalities to appoint inspectors to search out and prosecute all offenders against the Canada Temperance Act, which was held *intra vires* as relating to the administration of justice in the province. On the same principle, no doubt, may be supported the decision in Matthieu *v.* Wentworth, 4 R.J.Q. (Q.B.) 343, (1895). And see, also, *supra* pp. 507-9; and the report of Sir John Thompson, as Minister of Justice, of March 21st, 1891, on chapter 31 of the Manitoba Acts of 1890, respecting the diseases of animals, when he speaks of provincial enactments in aid of Dominion laws as to quarantine and contagious diseases: Hodgins' Provincial Legislation, 2nd ed., p. 947.

PROPOSITION 48.

48. An Act of the Dominion Parliament is not affected in respect to its validity by the fact that it interferes prejudicially with the object and operation of Provincial Acts, provided that it is not in itself legislation upon or within one of the subjects assigned to the exclusive legislative jurisdiction of the Provincial Legislatures.[1]

The above Proposition is derived from the judgment of the Privy Council in Russell *v.* The Queen,[2] where it is clearly enunciated and illustrated. The question there was, whether the Canada Temperance Act, 1878, was within the proper competency of the Dominion parliament to pass. At the place cited their lordships say:—"It appears that by statutes of the province of New Brunswick authority has been conferred upon the municipality of Fredericton to raise money for municipal purposes, by granting licenses of the nature of those described in No. 9 of section 92," (*sc.*, of the British North America Act), "and that licenses granted to taverns for the sale of intoxicating liquors were a profitable source of revenue to the municipality. It was con-

Licensing powers of provinces.

[1] Cf. Proposition 61 as to the corresponding rule in reference to provincial powers. See, also, Proposition 37 and the notes thereto.

[2] 7 App. Cas. at pp. 837-8, 2 Cart. at pp. 20-21, (1882).

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tended by the appellant's counsel, and it was their main argument on this part of the case, that the Temperance Act interfered prejudicially with the traffic from which this revenue was derived, and thus invaded a subject assigned exclusively to the provincial legislature.[1] But supposing the effect of the Act to be prejudicial to the revenue derived by the municipality from licenses, it does not follow that the Dominion parliament might not pass it by virtue of its general authority to make laws for the peace, order, and good government of Canada. Assuming that the matter of the Act does not fall within the class of subject described in No. 9 that sub-section can in no way interfere with the general authority of the Parliament to deal with that matter." And they point out that the Dominion legislation in question was not in itself legislation within the subject of No. 9 of section 92 of the British North America Act,[2] and that if, because of No. 9 of section 92, Parliament could never legislate with regard to any article or commodity which had or might be covered by such licenses as are therein referred to, it might be that laws necessary for the public good or public safety could not be enacted at all, as being thereby beyond the competency of Parliament, and yet not laws of the character specified in No. 9.[3]

May be interfered with by Dominion prohibition laws.

The Privy Council, therefore, in Russell *v.* The Queen, have answered the question suggested by

[1] See this argument strongly put per Wetmore, J., in Queen *v.* City of Fredericton, 3 P. & B. at p. 159, (1879). As Sir Farrer Herschell said on the argument in the Matter of the Dominion License Acts, 1883-4, (printed transcript from Marten & Meredith's shorthand notes, p. 12) :—"The local authority might license everybody in the county, and by reason of the Canada Temperance Act nobody in the county could sell."

[2] See, also, *supra* at pp. 435-6.

[3] Cf. Keefer *v.* Todd, 2 B.C., (Irving), at p. 249 (1885), a case referred to, also, *supra* pp. 446-7.

Fisher, J., in The Queen *v.* The Mayor of Fredericton,[1] namely:—"Whether the exclusive power of Parliament to regulate trade and commerce, and the exclusive power of the local legislature as to shop, tavern, and other licenses, being concurrent, one can constitutionally trench upon the other, and whether in working out any given authority it must not be so limited and restricted as not to interfere with any other." And their judgment is quite irreconcilable with the view nevertheless expressed by Henry, J., in the subsequent case of Sulte *v.* The Corporation of Three Rivers,[2] that the right to make laws for the peace, order, and good government of Canada does not include power to interfere with local legislation as to licenses for shops, taverns, etc. Henry, J., indeed, seems to imply that the Privy Council were led to the conclusion reached by them in Russell *v.* The Queen by virtual admission of counsel on the argument.[3] But it is clear that in Russell *v.* The Queen we have the deliberate conclusion of their lordships, for in Hodge *v.* The Queen[4] they expressly say that they "do not intend to vary or depart from the reasons expressed for their judgment in that case."

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Russell v. The Queen.

However, Ritchie, C.J., reminds us in Valin *v.* Langlois,[5] that the power of the local legislatures was,

[1] 3 P. & B. at p. 169, (1879).

[2] 11 S.C.R. at pp. 37-40, 4 Cart. at pp. 316-9, (1885).

[3] See 11 S.C.R. at pp. 37-8, 4 Cart. at p. 317. And to the admission in Russell *v.* The Queen, see, also, Mr. S. H. Blake, Q.C., *arguendo*, before the Supreme Court of Canada in the Matter of the Dominion License Acts, 1883-4: Dom. Sess. Pap., 1885, No. 85, p. 232. And on the recent argument on The Liquor Prohibition Appeal, 1895, Lord Herschell said of it:—"We had a large admission made there:" printed report at p. 168, (see *supra* p. 398, n. 1).

[4] 9 App. Cas. at p. 130, 3 Cart. at p. 160.

[5] 3 S.C.R. at p. 15, 1 Cart. at p. 172, (1879). Cf. his language in

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indeed, to be subject to the general and special legislative powers of the Dominion parliament, but yet while the legislative rights of the local legislatures are in this sense subordinate to the right of the Dominion parliament, such latter right must be exercised, "so far as may be, consistently with the right of the local legislatures; and, therefore, the Dominion parliament would only have the right to interfere with property or civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the parliament of Canada."[1]

Dominion may only interfere with provincial powers to extent necessary to exercise of its own.

In the words of Ramsay, J., in Corporation of Three Rivers *v.* Sulte,[2] citing in support like views expressed by Meredith, C.J., in Blouin *v.* The Corporation of Quebec[3] :—"Where a power is specially granted to one or other legislature, that power will not be nullified by the fact that, indirectly, it affects a special power granted to the other legislature."

It is impossible, therefore, to now accept as accurate the conclusion arrived at by Spragge, C., in Leprohon *v.* City of Ottawa[4], that :—"Acts of the provincial legislature which conflict with the powers conferred specifically or generally upon the general government are *ultra vires*[5] ; so, on the other hand,

Citizens Insurance Co. *v.* Parsons, 4 S.C.R. at p. 242, 1 Cart. at p. 292, (1880).

[1]Cf. *supra* p. 448, *et seq.* In this sense only can the words of Burton, J.A., in Regina *v.* Hodge, 7 O.A.R. at p. 274, 3 Cart. at p. 179, (1882), that the provincial legislatures are absolute and supreme over the subject-matters assigned to them, "without any possibility of interference by the Dominion legislature," be now accepted.

[2]5 L.N. at p. 333, 2 Cart. at p. 287, (1882).

[3]7 Q.L.R. 18, 2 Cart. 368, (1880).

[4]2 O.A.R. at pp. 524-5, 1 Cart. at pp. 594-5, (1878).

[5]See Proposition 61 and the notes thereto, where Leprohon *v.* City of Ottawa is further referred to.

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Acts of the Dominion parliament or government conflicting with powers conferred exclusively upon the provincial legislature would be *ultra vires*,—would be acts of usurpation. This must result from each being creatures of the one power; each deriving its authority from the one source. . . . There is, at the same time, an implied limitation upon every power conferred, whether conferred in terms or by implication, that it must not encroach upon or interfere with the powers conferred elsewhere."[1] Rather, as shown by the authorities cited in the notes to this Proposition, and Proposition 61, provided Acts of the Dominion parliament and local legislatures are upon subjects over which they respectively have jurisdiction, the fact that they may interfere prejudicially with each other does not make them in either case *ultra vires*, but in the veto power of the Governor-General a check exists in the hands of the central government.[2] And, in fact, it may perhaps be questioned how far the dictum of Patterson, J., in Smith *v.* The Merchants Bank,[3] that we should, if possible, avoid a construction of a Dominion Act which would bring it into conflict with the law of the province, can now be accepted as sound, further than a proper application of the rule laid down in the Interpretation Act may require, that every Act and every provision or enactment thereof shall receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according

In same way provinces may interfere with Dominion powers.

[1] Cf. per Ritchie, C.J., in Attorney-General of Ontario *v.* Mercer, 5 S.C.R. at p. 644, 3 Cart. at p. 33, (1881).

[2] As to the Dominion veto power, see Proposition 10 and the notes thereto; also the notes to Proposition 61.

[3] 8 O.A.R. at p. 28, (1883).

Prop. 48 to its true meaning and spirit.[1] It would not seem that in interpreting a Dominion Act, a Court of justice can, consistently with the scheme of the Constitution, allow itself to be influenced in any way by any consideration of what laws the provincial legislatures may have enacted.

[1] R.S.C., c. 1, s. 7, s-s. 56.

PROPOSITION 49.

49. The principle of the 91st section of the British North America Act is to place within the legislative jurisdiction of the Dominion Parliament general subjects which may be dealt with by legislation, as distinguished from subjects of a local or private nature in the province.[1]

Dominion has general subjects.

The above Proposition is suggested by the judgment of the Privy Council in L'Union St. Jacques de Montreal *v.* Belisle,[2] where they say :—"Their lordships observe that the scheme of distribution in that section, (*sc.*, section 91 of the British North America Act), is to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation; such legislation as is well expressed by Mr. Justice Caron when he speaks of the general laws governing faillite, bankruptcy, and insolvency."[3] But, though

[1] As the Privy Council say in their recent judgment on The Liquor Prohibition Appeal, 1895, [1896] A.C. at p. 359, all the matters enumerated in the sixteen heads of section 92 of the British North America Act are, "from a provincial point of view, of a local or private nature." And see Proposition 59 and the notes thereto.

[2] L.R. 6 P.C. at p. 36, 1 Cart. at p. 70, (1874).

[3] As to bankruptcy see *infra* at p. 550, n. 2. In Leprohon *v.* The City of Ottawa, 40 U.C.R. at p. 508, 1 Cart. at p. 662, (1877), Morrison, J.,

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their lordships here seem to be using the expression 'general legislation' principally by way of contrast to legislation relating to a particular association,[1] such as the Act in question before them, the object of the leading Proposition is to point out that the subjects assigned to parliament by section 91 are matters of general quasi-national importance.

Of common import to all provinces.

In the words of Lord Carnarvon in introducing the Bill now the British North America Act, 1867, in the House of Lords, quoted by Burton, J.A., in Hodge *v.* The Queen,[2] the real object of the Act "is to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces, and at the same time to retain for each province so ample a measure of municipal liberty and self-government as will allow and compel them to exercise those local powers

cites the words from the judgment of the Privy Council in L'Union St. Jacques de Montreal *v.* Belisle just quoted, and he draws the inference that we are to give the classes in section 91 a wide interpretation, as he says we are also those in section 92. Thus he says:— "The general rule in construing statutes is that where a general power is conferred any particular power is also conferred; and so in the case of L'Union St. Jacques de Montreal *v.* Belisle . . ," (citing the above passage). But the decisions in Citizens Insurance Co. *v.* Parsons, 7 App. Cas. 96, 1 Cart. 265, (1881), The Queen *v.* Robertson, 6 S.C.R. 52, 2 Cart. 65, (1882), and the case in relation to the Ontario Act respecting assignments for the benefit of creditors, Attorney-General of Ontario *v.* The Attorney-General for the Dominion of Canada, [1894] A.C. 189, show that we may easily err if we give the classes of subjects enumerated in section 91 too wide an interpretation with a view to including particular powers, or in order to accord with popular usage. See, *infra*, pp. 551-62.

[1] In the chapter on Private Bills in Mr. J. G. Bourinot's Parliamentary Procedure and Practice, 2nd ed. at p. 663, *et seq.*, he discusses questions of legislative jurisdiction arising out of private bill legislation in Parliament, and chiefly in connection with the incorporation of companies.

[2] 7 O.A.R. at p. 273, 3 Cart. at p. 178.

which they can exercise with great advantage to the community."[1] Prop. 49

Thus criminal law is one of the subjects assigned to the Dominion parliament, for, as observed by Harrison, C.J., in Regina *v.* Lawrence[2] :—"It is important that the law of a country as to crime and criminal procedure shall be uniform, so that the rights of all citizens shall be as much as possible equally respected, and the public wrongs of any citizen as much as possible equally punished."[3] Criminal law.

[1] Hans. 3rd Ser., Vol. 185, p. 563. To the Dominion parliament has been given "legislation upon the general classes of matters affecting the Dominion of the four provinces": per Badgley, J., in L'Union St. Jacques de Montreal *v.* Belisle, 20 L.C.J. at pp. 31-2, 1 Cart. at p. 75, (1874); "the large and extensive subjects affecting all the provinces": per Henry, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 552, 2 Cart. at p. 47, (1880); "subjects which from their nature affect the interest of the whole Dominion": per Dorion, C.J., in Regina *v.* Mohr, 7 Q.L.R. at p. 187, 2 Cart. at p. 262, (1881); "matters of general importance to the Dominion": per Begbie, C.J., in the Thrasher Case, 1 B.C. (Irving) at p. 183, (1882); "all properties, institutions, and powers that were essential to the good government of Canada": per Gray, J., S.C. at p. 227; "all subjects which are of general public interest to the whole Dominion": per Gwynne, J., in Queen *v.* Robertson, 6 S.C.R. at p. 66, 2 Cart. at p. 120, (1882); "subjects of national and general concern": per Burton, J.A., in Regina *v.* Wason, 17 O.A.R. at p. 236, 4 Cart. at p. 595, (1890); "matters in which as being of a general quasi-national and sovereign character the inhabitants of the several provinces might be said to have a common interest": per Gwynne, J., in *Re* Prohibitory Liquor Laws, 24 S.C.R. at p. 205, (1895); "generally those subjects that would be common to the whole Canadian people irrespective of origin or religion": per Sedgewick, J., S.C. at p. 233. Cf. Lord Monck's despatch to the Secretary of State of November 7th, 1864, transmitting the Quebec resolutions, (Can. Sess. Pap., 1865, Vol. 3, No. 12), who says that to the central government and legislature is "committed all the general business of the united provinces." *Dicta* as to general character of Dominion powers.

[2] 43 U.C.R. at p. 174, 1 Cart. at pp. 743-4, (1878).

[3] And cf. per Burton, J.A., in Regina *v.* Wason, 17 O.A.R. at p. 237, 4 Cart. at pp. 595-6, (1890). And as to 'criminal law' in No. 27 of section 91 of the British North America Act, see further *supra* at pp. 35-7, 49-50, 413-4, and 463-4; and Queen *v.* Ronan, 23 N.S. 421, (1891); Queen *v.* A. McDonald, 24 N.S. 35, (1891). In his Parliamentary Procedure and Practice, (2nd ed. at p. 674), Mr. Bourinot says:—"In the session of 1882 a bill respecting pawnbrokers, to prevent them practising extortion, was withdrawn by the mover at the request of the Minister of Justice, as it was doubtful if it was within the jurisdiction of the Dominion parliament": citing Can. Han., 1882, p. 266.

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The regulation of trade and commerce.

And among the general powers thus conferred upon the Dominion parliament, it is natural to find that of making laws in relation to the regulation of trade and commerce, as to which in the Queen *v.* The Mayor, etc., of Fredericton,[1] Fisher, J., says :— "This power like that relating to bills of exchange, or interest,[2] weights and measures, or legal tender, and certain other powers, was a necessary incident to the Union to secure a homogeneous

[1] 3 Pugs. and B. at pp. 168-9, (1879).

Interest.

[2] As to 'interest' which is assigned to the Dominion parliament by No. 19 of section 91 of the British North America Act, in Lynch *v.* The Canada North-West Land Co., 19 S.C.R. at p. 225, (1891), Patterson, J., says :—"We find that article associated with others numbered from 14 to 21, all of which relate to the regulation of the general commercial and financial system of the country at large. No. 19 is *ejusdem generis* with the others, and does not in my judgment include the matter of merely provincial concern with which we are now dealing." See *supra* pp. 388-9, 481. And cf. per Johnson, J., in Royal Canadian Insurance Co. *v.* Montreal Warehousing Co., 3 L.N. at p. 157, 2 Cart. at p. 366, (1880), where he held that an Act of the legislature of Quebec giving a certain company power to borrow money at such rate of interest as might be agreed was *intra vires*, and did not conflict with the power of "general legislation on the subject of interest," reserved to the Dominion parliament. No. 21 of the Dominion powers thus referred to by Patterson, J., is that over 'bankruptcy and insolvency,' as to which in Dupont *v.* La Cie de Moulin a Bardeau Chanfréné, 11 L.N. 225, (1888), in the Superior Court, Montreal, (where it was held that under it the Dominion parliament could legislate for the distribution of the estate of the debtor either with or without a discharge of his liabilities), Wurtele, J., quotes words of Mr. Wharton in his Treatise on Private International Law, to the effect that bankruptcy "is a species of national execution against the estate of an insolvent," and says :—"It is in the interest of the trade and commerce of the whole Dominion that there should be one uniform law for all the provinces, regulating proceedings in the case of insolvent debtors, unrestricted in its operation by provincial boundaries ; that it should be possible to obtain a national execution, and not merely a limited provincial one against the estate of an insolvent debtor who might hold property in several provinces, or transfer it from his own province into another." And as to 'bankruptcy and insolvency,' see Attorney-General of Ontario *v.* The Attorney-General of Canada, [1894] A.C. 189, which seems clearly to show that the provincial Acts in question in Johnson *v.* Poyntz, 2 R. & G. 193, 2 Cart. 416, (1881), and in *In re* The Wallace Huestis Grey Stone Co., Russ. Eq. 461, 3 Cart. 374, (1881), were rightly held not to be within the Dominion power over bankruptcy and insolvency ; and that Queen *v.* Chandler, 1 Hann. 458, 2 Cart. 421, (1868), was wrongly decided. See also an article on the Privy Council on Bankruptcy, 30 C.L.J. 182 ; and *supra* pp. 429-30.

Bankruptcy and insolvency.

whole, the object of the Union being to draw together the scattered settlements of the different provinces, of diverse races and religions, into one common people, to give them as far as practicable a community of interest and feeling; that so far as could be done consistently with their relative positions, their commercial intercourse with each other should be analogous; that the merchant or manufacturer in Ontario should find in Nova Scotia or New Brunswick the same principles of commercial law as were in operation in his own province; and transact his business, buy, sell, and trade, upon the same principles with an inhabitant of Pictou or St. Stephen as with a citizen of Toronto or London." Prop. 49

The regulation of trade and commerce.

And what Burton, J.A.,[1] has termed "the general and quasi-national sense" given to the Dominion power to make laws in relation to 'the regulation of trade and commerce,' by the Privy Council, in the Citizens Insurance Co. *v.* Parsons,[2] well illustrates the leading Proposition.[3] Their lordships here say that the words "may have been used in some such sense as the words 'regulations of trade' in the Act of Union between England and Scotland, (6 Anne, c. 11)," Article 6 of which enacted that all parts of the

[1] Regina *v.* Wason, 17 O.A.R. at p. 237, 4 Cart. at p. 595, (1890).

[2] 7 App. Cas. at p. 112, 1 Cart. at pp. 277-8, (1881).

[3] Under the Constitution of the United States, Article 1, section 8, (3), power is given to Congress to 'regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' Upon the argument in the Matter of the Dominion License Acts, 1883-4, before the Supreme Court of Canada, Mr. Bethune thus referred to the difference in the words conferring the Dominion power:—"I take it that there was a purpose in using the word 'trade, because the word 'trade' was not necessary to be used in connection with the American Constitution, the word 'trade' relating entirely to internal trade, which was not given, in fact, to the American Congress. And I take it that the word 'trade' was supplied with the very purpose of enabling the Dominion parliament to deal with all kinds of trade, internal trade as well as foreign trade": Dom. Sess. Pap., 1885, No. 85, at p. 154. Analogy of United States constitution.

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United Kingdom, from and after the Union, should be under the same 'prohibitions, restrictions, and regulations of trade.'[1] "Parliament has at various

The regulation of trade and commerce.

[1]As to this reference to the statute of Queen Anne, on the same argument, referred to in the last note, Ritchie, C.J., observes:—"Is there a man living in the Dominion of Canada who believes that when the Act of Confederation was agreed upon by the representatives of this country, to be submitted to the Imperial parliament, any one of those men had in his mind's eye the statute of Anne as the foundation of our Constitution?": *Ibid.* at p. 202. And cf. per Gwynne, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 217, (1895); and per Sedgewick, J., S.C. at pp. 237-8. But, with deference, the Privy Council merely refer to the Act of Union to illustrate the sense in which the words 'regulation of trade and commerce' may have been used, and do not say that in the use of the expression the framers of the British North America Act took the words from that Act. Sedgewick, J., (S.C. at pp. 232, *et seq.*), declares that the true answer to the question what is meant by the regulation of trade and commerce is to be sought by reference to provincial statutes and jurisprudence at the time of the Union, and to the circumstances under which that Union, as well as its particular character, took shape and form, and he refers especially to the consolidation of the statutes of Canada in 1859, and claims, (at p. 236), that by referring to these sources we have a clear indication of what at the time of the Confederation the Canadian people and legislatures understood to be included within those words. "They included in it," he says, "unquestionably, the carrying on of particular trades or businesses, and I think commercial law generally." (Cf. S. H. Blake, Q.C., *arguendo* before the Supreme Court in the Matter of the Dominion Liquor License Acts, 1883-4: Dom. Sess. Pap., 1885, No. 85, at pp. 82, 84-5.) But upon the argument before the Privy Council on appeal, Lord Watson said, as to this:—"You might derive some light from previous legislation if it was relevant. It might be relevant. Supposing there had been words in the old provincial Acts grouped under a particular head, and you found that head in this Act, I think such legislation would throw light on that." And Lord Herschell added:—"If you take it from two provinces, are we to suppose they used it," (*sc.*, 'regulation of trade and commerce'), "in the sense they used it in those two? If you could show they had used it in all the provinces, or that it was in general use, that would be different. It seems to me rather dangerous to take the use in two provinces." (See also *supra* at p. 53, *et seq.*) And Lord Davey said:—"I have read Mr. Justice Sedgewick's judgment very carefully, and more than once. This passage I have read more than twice, but I cannot for the life of me find out what he thinks 'trade and commerce' means, because . . the classes of subjects to which he attributes it seem to me incapable of any, I will not say scientific, but any logical meaning." Whereupon Mr. Edward Blake said:—"I suppose the object of the learned judge was this, to combat the proposition that it meant only in the view of the Canadians this general regulation of trade and commerce, that it was shown that in each province under 'regulation of trade or commerce' there were laws dealing with particular trades; and, therefore, that laws dealing with particular trades should be taken to be within the scope of the words": (printed report of the argument, at pp. 296-7; *supra* p. 398, n. 1).

The Act of Anne.

Ante-Confederation Canadian legislation.

times, since the Union," they say, "passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two Kingdoms." And they come to the conclusion that 'regulation of trade and commerce' in No. 2 of section 91 of the British North America Act includes "political arrangements in regard to trade, requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and may perhaps include general[1] regulation of trade affecting the whole Dominion, but it does not comprehend the power to regulate by legislation the contracts of a particular business or trade, (such as the business of fire insurance), in a single province."[2]

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The regulation of trade and commerce.

[1] As to the use of this word 'general,' on the argument of the recent Liquor Prohibition Appeal, 1895, (printed report at p. 200: see p. 398, n. 1), Lord Watson says:—"It is apt to be misused, and it is apt to mislead. It is not general as including all particulars, but it is general as distinguished from certain particulars."

[2] Neither would it, it is submitted, comprehend the power to regulate by legislation this or the other portion of what may be termed the machinery of trade, such as warehouse receipts. In Smith *v.* The Merchants Bank, 28 Gr. 629, (1881), however, Spragge, C., seems to have thought otherwise. But in Beard *v.* Steele, 34 U.C.R. 43, (1873), the Ontario Act as to the rights and liabilities of parties to bills of lading was held to be *intra vires*. Nevertheless in his report of January 28th, 1889, on a similar Nova Scotia Act of 1888, (ch. 30), relating to bills of lading, Sir John Thompson, as Minister of Justice, says that the competency of the provincial legislature in this regard is doubtful: Hodgins' Provincial Legislation, 2nd ed. at p. 582. Moreover, with reference to the regulation of a particular trade, on the argument in the Matter of the Dominion Liquor License Acts, 1883-4, before the Privy Council, Sir Farrer Herschell says:—"My contention certainly is that when once you show that any trade is regulated for the whole Dominion, as the insurance business was in that statute referred to in the Citizens Insurance Co. *v.* Parsons, and that that is done, not for any local purpose, but for the general purposes of the Dominion; then you have shown that it is for the peace, order, and good government of Canada in relation to the regulation of trade": (printed transcript from Marten & Meredith's shorthand notes at p. 168; see also *ibid.* at pp. 92, 165).

Regulating the machinery of trade.

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Their lordships, however, while speaking in this way as to the regulation of trade and commerce in Citizens Insurance Co. *v.* Parsons, expressly say that they abstain from any attempt to define the limits of the authority of the Dominion parliament in this direction. The effect of what they did say was thus paraphrased by Mr. Horace Davey, now Lord Davey, upon the argument before the Board in the Matter of the Dominion Liquor License Acts, 1883-4[1]:—"Regulation of trade and commerce means general regulations as applicable to trade generally, of what may be called, for want of a better word, a political character, that is for regulating trade and commerce between the Dominion and foreign countries, or other countries, including, of course, Great Britain, or, for instance, for regulating the trade between the provinces themselves. But it does not include minute regulations affecting the terms and conditions on which persons carrying on particular trades are to be allowed to do so in different localities." Their lordships also have themselves referred to their language in two subsequent judgments, but without further elucidating the subject;[2] and

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[1] Printed transcript from Marten & Meredith's shorthand notes, at p. 134.

Later Privy Council *dicta.*

[2] See Bank of Toronto *v.* Lambe, 12 App. Cas. at p. 586, 4 Cart. at p. 21, (1887), where they say that in Citizens Insurance Co. *v.* Parsons:—"It was found absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures. It was there thrown out that the power of regulation given to the Parliament meant some general or inter-provincial regulation. No further attempt to define the subject need now be made, because their lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or companies regulated, so far from restricting the expressions, as was found necessary in Parsons' case, they would be straining them to their widest conceivable extent;" and The Liquor Prohibition Appeal, 1895, Attorney-General for Ontario *v.* Attorney-General for the Dominion of Canada, and the Distillers and Brewers' Association of Ontario, [1896] A.C. at p. 363, where they say:—"The scope and effect of

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although the Dominion power in question has been the subject of much discussion elsewhere, the precise determination of its scope can scarcely be said to have been much advanced. And so upon the recent argument of The Liquor Prohibition Appeal, 1895,[1] Lord Watson says:—"I do not think any of the cases afford a definition, or anything like a precise definition, of what precisely is meant by the expression 'regulation of trade' in sub-section 2. There are explanations of it, but the explanations, as far as I can find, require as much explanation as the section itself."

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For the most part, the words of the Privy Council in Citizens Insurance Co. v. Parsons have been quoted in terms equally large.[2] On the

No. 2 of section 91 were discussed by this Board at some length in Citizens Insurance Company *v.* Parsons, where it was decided that, in the absence of legislation upon the subject by the Canadian parliament, the legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their lordships do not find it necessary to reopen that discussion in the present case."

[1] Printed transcript from Martin & Meredith's shorthand notes, at p. 210.

Attempted explanations

[2] Thus it has been said the 'regulation of trade and commerce' in No. 2 of section 91 means:—"The regulation of trade and commerce in the Dominion, which is "a very distinct thing from the individual trades or callings of persons subject to the municipal government of cities": per Johnson, J., in Angers *v.* The City of Montreal, 24 L.C.J. at p. 260, 2 Cart. at p. 337, (1876); cf. Mallette *v.* The City of Montreal, 2 L.N. 370, (1879); "not everything which might be connected incidentally with the operations of trade or the transactions of commerce": per Allen, C.J., in Queen *v.* The City of Fredericton, 3 P. & B. at p. 185, (1879); "the general features, and not the minute and trifling subjects which might otherwise be considered as included": per Henry, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 552, 2 Cart. at pp. 47-8, (1880); "general regulations of trade between the provinces or between the Dominion and other States, but not internal regulations and local trade within one province or within any one locality in the province": per Tessier, J., in Corporation of Three Rivers *v.* Major, 8 Q.L.R. at pp. 185-6, (1881); "the regulation of commerce in the wide sense," but the provinces may "make certain regulations affecting purely internal commerce": per Mackay, J., in *Ex parte* Leveille, 2 Steph. Dig. at p. 446, 2 Cart.

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argument, however, in Russell *v.* The Queen, in 1882,[1] counsel for the appellant says :—"Any such matters as embargo laws, intercourse between the different provinces, coasting regulations, regulations of navigation, and all those sort of matters, I submit, would come within it, but not an Act really dealing with the morals of a people in a particular district, which may be a very small district." And there are some *dicta* of Strong, J., as he then was, on the argument in the Matter of the Dominion Liquor License Acts, 1883-4, worth referring to in this connection. Thus he says :—"It has always struck me that those words, 'regulation of trade and commerce,' had reference to regulations of a fiscal, or what may be called an economic and fiscal character, and did not apply at all to these police regulations."[2] Again, he

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at p. 349, (1887); (cf. Lepine *v.* Laurent, 17 Q.L.R. at p. 229; and per Taschereau, J., in Huson *v.* The Township of South Norwich, 24 S.C.R. at p. 162); "commerce in a national point of view": per Jetté, J., in Bank of Toronto *v.* Lambe, M.L.R., 1 S.C. at p. 45, 4 Cart. at p. 101, (1887); "regulations relating to trade and commerce in their general and quasi-national sense, and not to the contracts or conduct of particular trades": per Burton, J.A., in Regina *v.* Wason, 17 O.A.R. at p. 237, 4 Cart. at p. 595, (1890); "not such matters as in the words of section 92, sub-section 16, of the British North America Act are merely of a local character": per Begbie, C.J., in Queen *v.* Howe, 2 B.C. (Hunter) at p. 37, (1890); "something of general concern to the Dominion at large," "something larger than a particular stipulation restricting a particular trade on some particular day": per Begbie, C.J., in Sauer *v.* Walker; 2 B.C. (Hunter) at p. 96, (1892); they may deal with "trade and commerce in a general way," "trade and commerce in its broad and large sense": per Ritchie, C.J., on the argument in the Matter of the Dominion License Acts, 1883-4, before the Supreme Court: Dom. Sess. Pap., 1885, No. 85, at p. 201. Cf. Story on the Constitution of the United States, 5th ed., Vol. 2, p. 23; *ibid.* pp. 156-164, n. 1.

[1] Manuscript transcript from Marten & Meredith's shorthand notes, second day at p. 18; see *supra* p. 398, n. 1.

[2] Dom. Sess. Pap., 1885, No. 85, at p. 73. But in the course of the argument on the recent Liquor Prohibition Appeal, 1895, members of the Board find some fault with the term 'police regulation.' Thus, Lord Herschell:—"Police regulation is a very vague phrase. I am quite aware that that was used in Hodge's case; but it only means something conducive to the good order of the Dominion. It has

says :—" My proposition is that although trade and commerce is not restricted to foreign commerce, or commerce between the provinces, as in the United States, it is still something different from mere retail buying and selling; that is, it is restricted to wholesale dealing and the word trade is a synonymous term. A British merchant would not call a man who kept a dram shop a merchant. . . . I do not understand the words 'trade and commerce' mean mere buying and selling. An operation of trade is something more than buying and selling again. It means this, buying goods and carrying goods, bringing goods from foreign countries, or bringing goods from the place where they are manufactured. No doubt that is the true import of both these words. They mean buying and selling, but they mean something more."[1] And in Poulin *v.* The Corporation

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nothing to do with the police. Saying that licensed premises shall not be open within prohibited hours is not a 'police regulation.' The police have nothing to do with it except to see that the law is not broken as in every other case." The Lord Chancellor:—"We have substituted the word 'police' for 'constable,' and if you get the old common law word there is a thread of theory that ran through it which was the preservation of the peace." Lord Davey :—"If you look at the derivation 'police,' I expect it means the maintenance of municipal order." Lord Watson :—"We are apt to use these expressions which really are not definitive of the thing enacted, but are descriptive of the executive body entrusted with the execution of the statute. It becomes a police matter, and we use the words 'police regulation' whenever it is entrusted to the police for enforcement. But that word does not define the nature of the enactment or the object of the legislature in passing it. Sanitary arrangements and that kind of thing are entirely for the benefit of the community." Lord Herschell :—"There is nothing about police in section 92 at all. It was used in Hodge's case. It was thought it pointed to a distinction which helped one. I confess you may call them police regulations; but it does not help one with reference to other cases to call them police regulations": printed report of the argument, at pp. 232-3. On the argument before the Supreme Court, Strong, C.J., had said :—"The superintendence of markets, roads, bridges, keeping order in public places, streets, and so on, is all police power": transcript from shorthand notes of Nelson R. Butcher, at p. 68. See also *supra* p. 360, n. 2.

Police regulations.

[1] Dom. Sess. Pap., *ibid.*, at pp. 117 and 155. Cf. per Strong, C.J., in Huson *v.* Township of South Norwich, 24 S.C.R. at p. 150; and cf., also, Story on the Constitution of the United States, 5th ed., Vol. 2, at

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of Quebec,[1] Tessier, J., also attempted to be more specific in this matter, saying :—" It is manifest that by the words 'traffic et commerce,' especially the English words 'trade and commerce,' it was intended to express legislation over the general interests of commerce which relate to the whole Dominion of Canada, the mode of importing and exporting merchandise, the storing of this merchandise in towns so as to protect the customs, entire prohibition in certain cases for the general protection of the commerce of the Dominion,[2] but not special laws of provin-

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p. 160, n., where he quotes from an argument of Mr. Hamilton these words :—" This," (*sc.*, prescribing rules for buying and selling), " is a species of regulation of trade, but it is one which falls more aptly within the province of the local jurisdictions than within that of the general government, whose care they must have presumed to have been intended to be devoted to these general political arrangements concerning trade on which its aggregate interests depend, rather than to the details of buying and selling. Accordingly, such only are the regulations to be found in the laws of the United States whose objects are to give encouragement to the enterprise of our merchants, and to advance our navigation and manufactures." See, however, p. 551, n. 3, *supra*.

[1] 7 Q.L.R. at p. 340, 3 Cart. at pp. 239-40, (1881).

The prohibition of trades.

[2] As to the prohibition of a trade possibly coming in certain cases within the Dominion power under discussion, on the recent argument in The Liquor Prohibition Appeal, 1895, Lord Herschell observed :—" It is the regulation of trade generally. One may be said to regulate trade by prohibiting or putting a fetter on a particular trade. If you prohibit all trades, you certainly do not regulate trade ; but you may be said to regulate trade by saying certain trades shall be unlawful " : printed report of the argument at p. 190 ; (see *supra* at p. 398, n. 1). And the Lord Chancellor (Lord Halsbury) also said :—" Trade generally may be regulated by prohibiting a particular trade. Take the case of the prohibition of the exportation of wool with which this country was familiar at one time. That was a regulation of trade, and it was a prohibition of a particular trade." Whereupon Lord Watson observed :—" We regulate the trade of these islands in tobacco by prohibiting its production, except to a very limited extent " : *ibid.* at p. 226. See, also, *ibid.*, at p. 179. There seems nothing inconsistent here with the fact that in their judgment in this case, [1896] A.C. at p. 363, the Judicial Committee say of the Canada Temperance Act, 1886 :—" Their lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed on their behalf, by Lord Davey, in The Municipal Corporation of the City of Toronto *v.* Virgo, [1896] A.C. at p. 93, in these terms :—' Their lordships think there is marked distinction to be drawn between the prohibition or preven-

cial legislatures which do nothing more than regulate the mode of selling and trading in certain matters of a merely local nature in the province." But it can scarcely be said that anything more definite has really been arrived at than is stated by Mr. Edward Blake in the course of the recent argument in The Liquor Prohibition Appeal, 1895[1], namely, that those regulations of trade are in the Dominion, and wholly in the Dominion, under both its powers, the general and the special, "which march wider, which cut deeper, which are of more general application, which go beyond minute regulations affecting a particular trade, which go beyond simple 'police matters,'[2] dealing with the varying circumstances and conditions of small and differently circumstanced localities."[3].

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tion of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.'" This clearly is not saying that as part of a legislative scheme for the regulation of trade, the prohibition of a particular trade might not be incidentally involved. See also in the Virgo case in the Court below, 20 O.A.R. at pp. 438-9, 441, (1893). But as pointed out *supra* p. 402, n. 1, the Board in this judgment clearly overrule those cases there cited where the provincial power to prohibit the liquor trade was denied as being an infringement upon the exclusive power of the Dominion parliament to regulate trade and commerce. And as to powers of prohibition, see *supra* pp. 339-401.

[1]Printed report of this argument at p. 225; (see *supra* p. 398, n. 1).

[2]See *supra* p. 556, n. 2.

[3]In accordance with the above the following provincial Acts have been held to be no infringements of the Dominion power for the "regulation of trade and commerce":—Act making police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail: Hodge *v.* The Queen, 9 App. Cas. 117, 3 Cart. 144, (1883); Act imposing a license duty on the vendors of provisions from any stall, place, or shop in any market place: La Cite de Montreal *v.* Riendeau, 31 L.C.J. 129, (1887); Act forbidding the carrying of any load of more than 2,000 lbs. in any wagon on any highway in Victoria district, unless the tires were at least four inches wide: Queen *v.* Howe, 2 B.C. (Hunter) 36, (1890); Act regulating selling from private stalls outside the public markets: Pidgeon *v.* The Recorders Court, 17 S.C.R. 495, 4 Cart. 442, (1890); Liquor License Regulation Act, closing saloons on Sunday: Sauer *v.*

Provincial Acts affecting trade.

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Walker, 2 B.C. (Hunter) 93, (1892); Act authorizing municipalities to issue licenses and levy by such means a sum not exceeding $50 every six months from every one who 'either on his own behalf or as agent for others sells, solicits, or takes orders for the sale by retail of goods, wares, or merchandise, to be supplied or furnished by any person or firm doing business outside the province, and not having a permanent and licensed place of business within the province': Poole *v.* City of Victoria, 2 B.C. (Hunter) 271, (1892); cf. Corporation of Three Rivers *v.* Major, 8 Q.L.R. 181, (1881); (but in his report of May 18th, 1889, on the Ontario Acts of 1888, the Minister of Justice objected that section 23 of the Municipal Amendment Act, 1888, in reference to license fees on transient traders, might be an infringement upon the jurisdiction of Parliament over trade and commerce: Hodgins' Provincial Legislation, 2nd ed., p. 312); Act enabling the Corporation of Vancouver to pass by-laws 'for regulating with a view to preventing the spread of infectious disease, the entry or departure of vessels at the port of Vancouver, the landing of passengers and cargoes from such boats or vessels, or from railroad carriages or cars': The Canadian Pacific Navigation Co. *v.* City of Vancouver, 2 B.C. (Hunter) 193, (1892); (but as to whether there was not here an invasion of the Dominion power over quarantine under No. 11 of section 91 of the British North America Act, see the report of the Minister of Justice of January 28th, 1889, upon the Nova Scotia Acts of 1888: Hodgins' Provincial Legislation, 2nd ed. at p. 582, also referred to in the notes to Proposition 62; also the report of the Minister of Justice of March 21st, 1891, on the Manitoba Act of 1890 respecting the diseases of animals: Hodgins' Provincial Legislation, 2nd ed. at p. 946; also cf. *ibid.* at p. 929, and Chy Lung *v.* Freeman, 92 U.S. at p. 280); Act as to the rights and liabilities of parties under bills of lading: Beard *v.* Steele, 34 U.C.R. 43, (1873); Act subjecting to penalty any hotel-keeper who should receive in payment or as a pledge for any liquor supplied in or from his licensed premises anything except current money or the debtor's own cheque on a bank or banker: Benard *v.* McKay, 9 M.R. 156, (1893). Cf. also for other cases where provincial Acts were held *intra vires*, which regulated the mode of selling and trading in articles other than intoxicating liquors: Angers *v.* City of Montreal, 24 L.C.J. 259, 2 Cart. 335, (1876); *Re* Harris and the Corporation of the City of Hamilton, 44 U.C.R. 641, 1 Cart. 756, (1879); Mallette *v.* City of Montreal, 24 L.C.J. 263, 2 Cart. 340, (1879); Bennett *v.* Pharmaceutical Association of Quebec, 1 Dor. Q.A. 336, 2 Cart. 250, (1881). And doubt may well be felt as to the correctness of the decision in The Canadian Pacific Navigation Co. *v.* City of Vancouver, 2 B.C. (Hunter) 193, (1892), so far as it was there held that a provincial Act authorizing the exclusion from Vancouver of all passengers from Victoria would be *ultra vires* as infringing on the Dominion power over the regulation of trade and commerce; and also of the view expressed by Begbie, C.J., in Regina *v.* The Corporation of Victoria, 1 B.C. (Irving) at p. 331, (1888), that for a provincial legislature to authorize municipalities to refuse pawnbrokers' licenses or other municipal licenses to members of a special class, such as, in that case, Chinamen, would be *ultra vires* as "a very wide interference with trade and commerce which is totally removed from their control by the British North America Act"; (cf., however, *supra* pp. 258-9); and also of the objection taken by Sir John Thompson as Minister of Justice in 1886 against the provisions of a Nova

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cision of the Supreme Court in the Queen *v.* Robert- **Prop. 49**

Scotia Act, 48 Vict., c. 23, respecting 'the regulation and inspection of provisions, lumber, fuel, and other merchandise,' that some of its provisions amounted to legislation respecting trade and commerce : Hodgins' Provincial Legislation, 2nd ed. at p. 532. On the strength of its power over the regulation of trade and commerce, the Dominion has objected —it may perhaps be thought unjustifiably—to the incorporation under provincial Acts of Chambers of Commerce and Boards of Trade : Hodgins' Provincial Legislation, 2nd ed. at pp. 1158-9, and has itself incorporated such Boards of Trade ; cf. R.S.C., c. 130, being a general Act for the incorporation of such bodies throughout the Dominion, and Bourinot's Parliamentary Procedure and Practice, 2nd ed. at p. 669. Sir J. Thompson as Minister of Justice, in his report of March 21st, 1891, in reference to No. 12 of the British Columbia Acts of 1890, being an Act to amend the Game Protection Act, which forbade the exportation out of the province of any animals or birds mentioned in the Game Protection Act in their raw state, inclines to the opinion that "the legislation operates directly as a restriction on trade and commerce, and the Dominion parliament alone, under its general powers of legislation and under its particular powers in connection with the regulation of trade and commerce, may declare what goods may or may not be exported from Canada": Hodgins' Provincial Legislation, 2nd ed. at p. 1121. And in the report of the same date he raises similar objections to a Manitoba Act, (c. 32 of 1890), being an Act for the protection of game and fur-bearing animals, which contained similar provisions: Hodgins, *ib.* at p. 929. But cf. Regina *v.* Boscowitz, 4 B.C. 132, (1895), where such an Act was held *intra vires* of the province, the Dominion power over trade and commerce not preventing "the legislature prohibiting export as incidental to and as carrying out the general scheme of game protection in the province." And so per Killam, J., in Queen *v.* Robertson, 3 M.L.R. at p. 620, (1886). It may be observed also in this connection that in their recent judgment in The Liquor Prohibition Appeal, 1895, [1896] A.C. at p. 368, the Privy Council referring to the provisions of the Canada Temperance Act, 1886, whereby manufacturers of liquor and wholesale merchants may sell for delivery anywhere beyond the district in which they carry on business, say :—"If the adjoining district happens to be in a different province, it appears to their lordships to be doubtful whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a provincial legislature." Cf., also, *supra* at p. 322, *et seq.*, as to extra-territorial legislation. And as to the distinction between regulation and taxation, see Weiler *v.* Richards, 26 C.L.J. N.S. 338, (1890), where it is pointed out that although these often go together they are essentially different. See also Bank of Toronto *v.* Lambe, 12 App. Cas. at p. 586, 4 Cart. at p. 21, where the Privy Council say with reference to the Dominion power to regulate trade and commerce :—"If they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in Parson's case, they would be straining them to their widest conceivable extent." And on the same point on the recent argument on The Liquor Prohibition Appeal, 1895, where this case of Bank of Toronto *v.* Lambe is referred to, Lord Watson says :—"Do you regulate a man when you tax him ?" And Lord Herschell thereupon says :—"May it not be necessary to regard it from this point of view to find what is within regulation of trade and commerce, what is the object and scope of the legislation ? Is it some public object which

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son[1] seems to harmonize well with it. There they decided that the British North America Act in assigning to the parliament of Canada the right to legislate with respect to sea coast and inland fisheries did not thereby give authority to deal with matters of property and civil rights, such as the ownership of the beds of the rivers or of the fisheries, or the right of individuals therein; but that what the Act gave to Parliament was a right to legislate in regard to matters of national or general concern, such as the forbidding fish to be taken at improper seasons, or in an improper manner, or with destructive instruments,—such general laws as are for the benefit of the public at large as well as of the owner.[2]

The regulation of fisheries.

And in The Longueuil Navigation Co. *v.* The City of Montreal,[3] it was held that notwithstanding that by No. 10 of section 91 of the British North America Act, 'navigation and shipping' were placed under the jurisdiction of the Dominion parliament,

incidentally involves some fetter on trade or commerce, or is it the dealing with trade and commerce for the purpose of regulating it? May it not be that, in the former case, it is not a regulation of trade and commerce, while in the latter it is, though in each case trade and commerce in a sense may be affected?" And Lord Watson then says:—"It would be difficult to imply from these words 'the regulation of trade and commerce,' whilst the power of direct taxation is given to the province,—the clauses must be read reasonably together,—it would be difficult to suppose that regulating commerce meant the passing of an Act by the Dominion legislature exempting banks from provincial taxation, for practically that is what the argument in that case had to come to; that under the words 'regulating commerce' was implied a power of exempting a bank from provincial taxation or the liability to be taxed by the provincial parliament": printed report of the argument, at pp. 120-1; cf. also *ibid.* at p. 141; see *supra* p. 398, n. 1.

[1] 6 S.C.R. 52, 2 Cart. 65, (1882).

[2] This decision has been very recently followed and confirmed by the same Court in *In re* Provincial Fisheries, 26 S.C.R. 444. See, however, per Gwynne, J., in that case at pp. 542-4; and see also the notes to Propositions 53 and 54.

[3] 15 S.C.R. 566, M.L.R. 3 Q.B. 172, 4 Cart. 370, (1888).

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an Act of the Quebec legislature authorizing the levy of a tax upon ferryboats, including steamboats, carrying passengers and goods between Montreal and places not distant more than nine miles, was *intra vires*. And so in *Re* Lake Winnipeg Transportation Lumber and Trading Co.,[1] Taylor, C.J., held that the incorporation of a company as carriers of passengers and goods by water did not fall within 'navigation and shipping,' in No. 10, saying:—"Legislation on that subject would seem rather to deal with such matters as the law of the road, lights to be carried, how vessels are to be registered, evidence of ownership and title, transmission of interest and such matters."[2]

Navigation and shipping

Analogy of the Constitution of the United States.

And to conclude by a reference to the Constitution of the United States we may cite the following words of Burton, J. A., in Leprohon *v.* City of Ottawa[3]:—"The powers delegated to the government of the United States, like those granted by the Imperial legislature exclusively to the Dominion, concern, speaking generally, public functions and duties of a higher and more extensive order than the remaining powers which the people reserved to the States governments. In other words, the people entrusted to the central authority the powers

[1] 7 M.R. at p. 259, (1891).

[2] By virtue of its power over 'navigation and shipping,' and 'the regulation of trade and commerce,' the Dominion parliament has power to declare what shall be deemed an interference with navigation, and to require its previous sanction to any work in navigable waters: per Girouard, J., in *In re* Provincial Fisheries, 26 S.C.R. at p. 576. All the judges were of the same opinion, and held R.S.C., c. 92, an Act respecting certain works constructed in or over navigable waters, *intra vires*. Cf. as to the similar power of Congress, by virtue of its right to regulate commerce with foreign nations, and among the several States: Story on the Constitution of the United States, 5th ed., Vol. 2, pp. 16-7, n. (*a*).

[3] 2 O.A.R. at p. 546, 1 Cart. at p. 619, (1878).

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and functions which were deemed necessary for the carrying on the government of the Union, whilst those deemed appropriate for the carrying on of the government of the individual States were reserved to the State authorities. With the exception of the power of declaring war and making treaties, the powers granted to the general government of the United States are similar to those granted by the Imperial legislature to the Dominion, — among others, the power of appointing its own officers, and an unlimited power to raise money by any mode or system of taxation."

PROPOSITION 50.

50. If an Act of the Parliament of Canada, the objects and scope of which is general, and within its proper competency to deal with, provides that it shall come into force in such localities only in which it shall be adopted in a certain prescribed manner, or, in other words, by local option, this conditional application of the Act does not convert it into legislation in relation to matters of a merely local or private nature, which by No. 16 of section 92 of the British North America Act are within the exclusive control of the Provincial Legislatures. The manner of bringing such an Act into force does not alter its general and uniform character.

Russell *v.* The Queen.

This Proposition is established by the judgment of the Privy Council in Russell *v.* The Queen.[2] It was there contended with reference to the Canada Temperance Act, 1878, that as the prohibitory and penal parts of the Act in question were to come into force in those counties and cities only in which it was adopted in the manner prescribed, *i.e.*, by local option, the legislation was in effect, and on its face, upon a

[1] See Proposition 42 and the notes thereto.

[2] 7 App. Cas. at pp. 841-2, 2 Cart. at pp. 24-6, (1882).

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matter of a merely local nature. Their lordships, however, overruled this contention, and held the Act to be *intra vires*, observing:—"The Act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect, and might be put in motion at once, and everywhere within it. . . The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. . . The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localizes the subject and scope of the Act, than a provision in an Act for the prevention of contagious diseases in cattle, that a public officer should proclaim in what districts it should come into effect would make the statute itself a mere local law for each of these districts. In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character."[1]

Conditional legislation.

Local option Acts.

[1] On the argument in this case, counsel for the Dominion met the contention above indicated thus:—"Permissive Bills are by no means rare. Let us look at some which have been passed before, and just see whether the local option connected with them at all results in" (*quære*, 'from') "their not being matters of public interest. I venture to say that the very contrary is the case, and that why, as a rule, a Bill is made permissive or subjected to a local option, is that public feeling is in such a state about it from its general interest and importance that it is difficult for the legislature to do more than make tentative legislation; and that the object of making the option is not because it is not a matter of public interest, or is of a merely local or private nature, but because, as yet, they do not dare, in the state of public opinion, to do, as I said, more than make tentative legislation. . . . I submit it is the greatness and not the smallness or meanness of the interest which is at the root of this local option": second day at p. 123, *et seq.* See *supra* p. 398, n. 1.

PROPOSITION 51.

51. If the subject-matter dealt with comes within the classes of subjects assigned to the Parliament of Canada, [or if, though this be not the case, the law be one for the peace, order, and good government of Canada in relation to any matter not coming within the classes of subjects assigned to the Legislatures of the Provinces], there is no restriction upon that Parliament to prevent it passing a law affecting one part of the Dominion and not another, if in its wisdom it thinks the legislation applicable to or desirable in one and not in the other.

Russell v. The Queen.

The above Proposition is, with the exception of the portion in brackets, suggested by the words of Ritchie, C.J., in City of Fredericton *v.* The Queen,[1] in which the validity of the Canada Temperance Act, 1878, came into question. They are, however, only *obiter dicta*, for he immediately goes on to remark that the Act in question is a general law applicable to the whole Dominion, though it may not be brought into active operation throughout the whole Dominion.[2] But the principle of the Proposition would certainly

[1] 3 S.C.R. at p. 530, 2 Cart. at p. 30, (1880).

[2] See Proposition 50 and the notes thereto.

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seem affirmed, so far as concerns the enumerated classes of subjects, by the Supreme Court in Quirt *v.* The Queen,[1] where the Court held *intra vires* as an Act in relation to bankruptcy and insolvency the Dominion Act, 33 Vict., c. 40, which, reciting the insolvency of the Bank of Upper Canada, provided for its winding up, and for a fair and equitable adjustment and settlement of the claims of all creditors. For if by virtue of its power to make laws in relation to bankruptcy and insolvency Parliament can provide for the winding up in insolvency of a single institution, it would seem *a fortiori* that it could confine the scope of its bankruptcy and insolvency legislation within any territorial limits it saw fit.[2]

Special winding-up Act.

Quirt v. The Queen.

The *dicta* of the Privy Council in L'Union St. Jacques de Montreal *v.* Belisle,[3] already referred to in the notes to Proposition 49,[4] to the effect that there is no indication in any instance of anything being contemplated in the enumeration of subjects of legislation in section 91 of the British North America Act, "except what may be properly described as general legislation," were cited in Quirt *v.* The Queen[5] against the validity of the Act in question, but it will be remembered that in the former case their lordships in a later portion of their judg-

[1] 19 S.C.R. 510, (1891), affirming the decisions of the Courts below, reported *sub nom.* Regina *v.* County of Wellington, 17 O.R. 615, 17 O.A.R. 421.

[2] In the chapter on Private Bills in Mr. J. G. Bourinot's Parliamentary Procedure and Practice, 2nd. ed. at p. 663, *et seq.*, he discusses questions of legislative jurisdiction arising out of private bill legislation in the Dominion parliament, chiefly in connection with the incorporation of companies.

[3] L.R. 6 P.C. at p. 36, 1 Cart. at p. 70, (1874).

[4] See *supra* p. 547.

[5] See 17 O.A.R. at pp. 423-4, 19 S.C.R. at p. 512.

ment[1] take pains to point out that the provincial Act, the validity of which was in question before them, and which itself was a special Act relating to the financial affairs of a single institution, and was held by them to be *intra vires*, did not propose a final distribution of the assets of the institution on the footing of insolvency or bankruptcy, did not wind it up, but, on the contrary, contemplated its going on, and possibly at some future time recovering its prosperity; and that there was no proof that the institution was in any legal sense within the category of insolvency.[2] Accordingly, in Quirt *v.* The Queen,[3] Strong, C.J., considers the Privy Council as indicating in L'Union St. Jacques de Montreal *v.* Belisle "that a special statute, providing for the winding up of an incorporated company, would be bankruptcy or insolvency legislation"; while Patterson, J.A., with whom Taschereau concurs, expresses himself in like manner,[4] saying :—"The words 'bankruptcy and insolvency' in that article," (*sc.*, No. 21 of section 91 of the British North America Act), "no doubt point primarily to the enactment of a general bankrupt or insolvent law, as was well explained by Lord Selborne in delivering the judgment of the Judicial Committee in L'Union St. Jacques de Montreal *v.* Belisle, but, as I think is conceded by the same judgment, a special Act for the winding up of some par-

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L'Union St. Jacques v. Belisle.

Special winding-up Acts.

[1] L.R. 6 P.C. at pp. 37-8, 1 Cart. at pp. 71-2.

[2] On the other hand, the Privy Council did not actually decide, nor was it necessary for them so to do, that if the Act in question had been, properly regarded, an Act providing for the winding-up in bankruptcy and insolvency of the institution to which it related, it would have been *ultra vires* as an infringement of the Dominion power over No. 21 of section 91.

[3] 19 S.C.R. at p. 517. And cf. per Osler, J.A., S.C., 17 O.A.R. at p. 443.

[4] 19 S.C.R. at pp. 521-2.

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ticular company which was insolvent and the distribution of its assets would not be beyond the competency of the Dominion parliament. . . It is easy to imagine cases arising in connection with bankruptcy proceedings under a general law where special legislation would be required, such, for instance, as the necessity for curing some irregularity so as to validate or remove doubts as to titles taken under the proceedings. There must be power to do this in one legislature or the other,[1] and I take it to be obvious that the power would be in the Dominion legislature alone. Such legislation would be like that now under consideration, special legislation addressed to an individual case, but it would not on that account be *ultra vires*." In the Court of first instance, Street,

Special Acts in matters of insolvency.

J.,[2] without mentioning the above Privy Council judgment, said:—"The right to pass a general law of the kind must also involve the power to pass a special law to meet a particular case; the local legislature having no power to deal with insolvency legislation at all are debarred from passing either a general or special Act, and the right must therefore exist in the other legislature." In the Ontario Court of Appeal, Hagarty, C.J.O., and Osler, J.A., agreed that the Act was *intra vires*. Burton, J.A., did not find it necessary, in the view he took, to consider the question[3] whether the Dominion parliament "were empowered to pass a law affecting only a particular firm who were in embarrassed or insolvent circumstances, and making a special bankruptcy law applicable to that particular firm." Maclennan, J.A.,

[1] Cf. per Osler, J.A., S.C., 17 O.A.R. at pp. 443-4, and Proposition 26.

[2] 17 O.R. at p. 618.

[3] 17 O.A.R. at pp. 432-3.

alone expressed the view that[1] "the power of legislation over bankruptcy or insolvency, which was intended to be conferred on the Dominion parliament, was the same as had been exercised by the Imperial parliament and by the provincial legislatures before Confederation, namely, the passing of laws more or less general in their application, with proper courts and procedure and machinery for carrying them into effect, and not Acts declaring a particular person or firm or corporation bankrupt or insolvent, or putting their affairs into a course of liquidation." Legislation of the latter kind, he held, was "intended to be given to the legislatures of the provinces, as matters of property and civil rights, and matters of a merely local and private nature."[2]

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Bankruptcy and insolvency.

[1] 17 O.A.R. at pp. 452-3.

[2] See, also, *supra* at pp. 385-6. As Mr. Clement says in The Law of the Canadian Constitution, at p. 355, the judgment of the Supreme Court in Quirt *v.* The Queen "must be taken as conclusive upon all Canadian Courts, that the power of the Dominion parliament under the various sub-sections of section 91," (*sc.*, of the British North America Act), "does extend to private bill legislation so long as the subject-matter legislated upon can be fairly said to fall within any of those sub-sections." See, also, *ibid.* at pp. 352 and 464-5. In the former place, Mr. Clement refers in this connection to the fact that the Privy Council has affirmed the right of the Dominion parliament to incorporate companies: as to which see *supra* p. 504. Whether the Act in question in Quirt *v.* The Queen was properly regarded as within the category of bankruptcy and insolvency legislation seems somewhat doubtful since the decision of the Privy Council in reference to the Ontario Act as to assignments for creditors, Attorney-General of Ontario *v.* Attorney-General of Canada, [1894] A.C. 189. See per Burton, J.A., S.C., 20 O.A.R. at pp. 496-8. Perhaps, however, such view may still be upheld on the ground that the Act amounted to a bankruptcy proceeding by Parliament itself *in invitum* against the insolvent institution. And see per Street, J., in Regina *v.* County of Wellington, 17 O.R. at p. 618. In the Court of Appeal in that case (17 O.A.R. at p. 428), Hagarty, C.J.O., placed the Act in question rather under the Dominion power over banking and the incorporation of banks, saying:—"It perhaps may be objected that such special legislation may be faulty. I hardly see this, where the special legislation is in reference to settling the affairs of an institution wholly the creation of Parliament, and wholly outside the creative powers of the provinces;" as to which cf. *supra* p. 457, n. 2; and Ross *v.* Guilbault, 4 L.N. 415, (1881); Ross *v.* The Canada Agricultural Insurance Co., 5 L.N. 22, (1882). In the

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It is in harmony with the leading Proposition that in the case of the Picton,[1] the Supreme Court unanimously affirmed the validity of the Dominion Act constituting the Maritime Court of Ontario, although it was contended that as a Dominion Court its jurisdiction could not properly be limited to one province. The judgment of the Court proceeded on the Dominion powers over 'navigation and shipping,' and 'the regulation of trade and commerce,' in conjunction with that given by section 101 of the British North America Act to establish Courts for the better administration of the laws of Canada.[2] Ritchie, C.J., dismissed the opposing contention as not arguable, and said:—"You might as well contend that the Exchequer Court Act is *ultra vires*, because some parts are only applicable to one province."[3]

The Maritime Court of Ontario.

Dominion residuary power.

But the correctness of the leading Proposition in respect to laws in relation to the enumerated classes of Dominion subjects may seem more obvious than in respect to other Dominion laws for the peace, order, and good government of Canada,[4] not only because those classes of subjects are assigned, 'notwithstanding anything in this Act,' and, therefore, notwithstanding any legislative powers given to the provinces, exclusively to the Dominion parliament,[5] but, also,

Supreme Court in Quirt *v.* The Queen, 19 S.C.R. at p. 514, Ritchie, C.J., also rested the validity of the legislation in question on 'banking and the incorporation of banks.'

[1] 4 S.C.R. 648, 1 Cart. 557, (1879).

[2] As to section 101, see *supra* p. 515, n. 1; also Farwell *v.* The Queen, 22 S.C.R. at pp. 561-2.

[3] See, further, upon the subjects under discussion, Proposition 33 and the notes thereto, *supra* at pp. 381-6.

[4] See *supra* pp. 308-9, 494.

[5] See *supra* pp. 427-9.

because of the concluding clause of section 91.[1] For although the Privy Council have in their recent judgment on The Liquor Prohibition Appeal, 1895,[2] construed this clause as intended "to derogate from the legislative authority given to provincial legislatures" by the sixteen sub-sections of section 92 of the British North America Act, "to the extent of enabling the parliament of Canada to deal with matters local or private, in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91"[3]; it would seem, also, to have the further meaning and effect, that the legislatures of the provinces cannot legislate on any of the enumerated matters in section 91 for their own provinces under the pretence or contention that the legislation is of a provincial or local character. And such is the force attributed to it by Strong, C.J., in the case just referred to of Quirt *v.* The Queen,[4] where he says:—"The only reasonable ground upon which such enactments as these under consideration could be rejected from the category of bankruptcy and insolvency statutes authorized by section 91, sub-section 21, would be that they were special and not general laws, and, therefore, were to be considered as assigned to the provincial legislature under the 16th clause

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The last clause of sect. 91, B.N.A. Act.

[1] As to which see, further, Proposition 59 and the notes thereto.

[2] [1896] A.C. 348, at pp. 359-60. See *supra* p. 393, n. 1.

[3] See *supra* p. 430, n. 4.

[4] 19 S.C.R. at p. 516. Cf. Clement on the Law of the Canadian Constitution, at pp. 352-3. And see the notes to Proposition 59. As to Dominion bankruptcy and insolvency Acts, applying to one or more provinces only, see per Hagarty, C.J.O., in Clarkson *v.* The Ontario Bank, 15 O.A.R. at p. 178, 4 Cart. at p. 513; per Osler, J.A., S.C., 15 O.A.R. at p. 191, 4 Cart. at pp. 528-9.

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of section 91, which authorizes legislation on matters of a local and private nature within the province. The answer to this, however, is, that any matter which comes within the terms of any of the subjects enumerated in section 91, although in other respects it might be classed under the head of local and private legislation, is expressly excepted from the powers of the provincial legislature by the last clause of section 91."[1]

Dominion residuary power.

Nevertheless the Proposition under consideration seems equally correct in its application to the Dominion power under the introductory provisions of section 91 of the British North America Act to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the provinces, even though such matters are not within the classes of subjects enumerated in that section, which latter are only stated as examples of the Dominion legislative powers.[2] As pointed out by the Privy Council in the recent Liquor Prohibition Appeal, 1895,[3] the Parliament of Canada does not derive jurisdiction from these introductory provisions of section 91 "to deal with any matter which is in substance local or provincial, and does

[1] In the argument in the recent Liquor Prohibition Appeal, 1895, on Mr. Haldane saying:—"The enumeration in section 91 is only for greater certainty as is stated," Lord Davey says:—"The enumeration has some value besides that, because if it comes within the enumerated matters, then it is not of a local or private nature, because it is confined to the locality, so that it has something more than that value": printed report, at p. 142; see *ibid.*, pp. 163, 195, and 212, at which last place Lord Watson says:—"No pretext could be made by the provincial legislature that it could legislate on the subject of bankruptcy." And so Lord Davey, *ibid.* at p. 244.

[2] See *supra* pp. 308-9, 494; and Proposition 26 and the notes thereto.

[3] [1896] A.C. 348, at p. 361.

not truly affect the interest of the Dominion as a whole;" but "some matters in their origin local and provincial might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian parliament in passing laws for their regulation or abolition, in the interest of the Dominion;" and although, as Lord Herschell stated on the recent argument before the Board in Fielding *v.* Thomas[1]—"there can be no doubt, speaking generally, that the object and scheme of the Act is in section 91 to give the Dominion parliament those things which were to be dealt with as a whole for the whole Dominion; that is the scheme of it"; yet in the words of Lord Davey, immediately preceding, it seems clear that —"if the particular circumstances of any province demanded a particular kind of legislation which was within the ambit of the Dominion parliament, the Dominion parliament might pass an Act relating to only one province."[2]

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Dominion legislation for particular provinces.

Direct authority on the subject is not, indeed, to be found in reported decisions, but it has been considerably discussed in various other arguments before the Judicial Committee, and in a manner which tends to confirm the correctness of this conclusion. Thus in the argument in Hodge *v.* The

[1][1896] A.C. 600. See manuscript transcript from the shorthand notes of Cock and Kight, at p. 50.

[2]Mr. Edward Blake, who was arguing the case for the respondent, the plaintiff, replied to Lord Davey's observation:—"That has been the rule"; and Lord Davey then read the concluding clause of section 91, above referred to, whereupon Lord Herschell said:—"If you cannot find it in section 92 anywhere, it is in section 91. Only then the doubt that occurred to me was whether under section 91 they could deal otherwise than with the whole of Canada." Lord Watson refers to the fact as notable that section 94 gives Parliament power to legislate for a single province for the purpose of producing uniformity. See, also, section 95.

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Queen,[1] Mr. Jeune, who was of counsel, said :—" In the division of subjects by the British North America Act the way in which the legislation is divided between the provinces and the Dominion is not with reference to the area to which the legislation is to apply, but with reference to the subject-matter of that legislation. Of course, when the Imperial parliament took upon itself the duty of apportioning the legislative functions between the Dominion and the provinces it would have been possible to have proceeded on the principle of the division of legislation by area; that is to say, they might have said a province may legislate with reference to all matters in the province, but where you have legislation extending over the whole Dominion that legislation shall be given to the Dominion. That would have been a possible mode of dividing the legislative functions. It is obvious that it would have been a very inconvenient one, and probably one in which[2] would very soon have found itself in inextricable difficulties, because, of course, these difficulties would have arisen, that it would have been extremely difficult to say that the Dominion, having power to legislate for the four provinces, should not have the power to legislate for three, or for two, or for one. It would have been almost absurd to say that the Dominion should have no power to legislate unless their legislation was such as was capable of being similarly enforced with reference to all the provinces. It would have been almost absurd in any case when one considers the vast natural differences which exist between the four provinces; some of them more inland than others;

Distribution of power under B.N.A. Act is by subject-matter, not by area.

[1] Dom. Sess. Pap., 1884, Vol. 17, No. 30, at pp. 62-3.

[2] There is a word missing here in the reprint; perhaps " Canada " may be suggested.

some more crowded than others, and in altogether different positions; but the absurdity is brought to its highest point when one considers that two wholly different sets of laws (are) in force within the provinces, and that while the province of Quebec had its laws based on the laws of France, the province of Ontario would have its laws based on the common law of England. . . The Constitution of Canada has proceeded upon this principle, that certain subjects are given expressly and exclusively,—and I think stress is to be laid on the word "expressly,"[1]—to the provinces. Certain other subjects are given *eo nomine*, and expressly to the Dominion." Prop. 51

He then proceeds to make some remarks which, though directed to the enumerated classes of Dominion subjects only, are worth quoting. After referring to the rule laid down in Citizens Insurance Company *v.* Parsons,[2] from which Proposition 58 is derived[3]; and, pointing out that that rule states that in determining the validity of a provincial Act "you have first to see whether a thing is expressly in the list as a provincial matter as regards its subject-matter, not as regards its area of legislation," he says:—"There are things that strike one's eye at once, where it is obvious that legislation would affect provinces in a very different degree. For example, matters like beacons and lighthouses, and I see even the individual case of Sable Island.[4] . . Clearly legislation with regard to things like beacons and lighthouses, although Special Acts for special localities.

[1] It seems probable this is a misreport for 'exclusively'; as to which see, however, the notes to Proposition 41, *supra*, pp. 487-494; also, *supra*, pp. 432-3.

[2] 7 App. Cas. 96, 1 Cart. 265, (1881).

[3] See, also, Proposition 43.

[4] No. 9 of section 91.

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made by the Dominion, must be legislation of a local character. . . Sable Island is a place where for lighting purposes it is necessary jurisdiction should be exercised; therefore legislation with regard to that would be legislation as regarded its area as local as any legislation could be, but it is within the Dominion, because the subject-matter is given to the Dominion—that applies to every single one of that list of subjects. They are all matters in which the Dominion can legislate, either by the general law applying to all the provinces, or by a law applying to particular parts of the Dominion." And these remarks were listened to by the Board without interruption or question.

'Merely local or private in the province.'

And in the still earlier argument in Russell *v.* The Queen,[1] one of the counsel, Mr. Fullarton, makes some interesting remarks. He says:—"What is the meaning of the words 'matters of a merely local or private nature in the province'? . . . It does not mean that anything that happens to be limited in its locality, though it is of public importance in its nature, is without the bounds of the legislative powers of the Dominion; but it only means, if it is a matter so merely local in its nature that it could only interest that locality, and could not affect any person outside that locality, then it is not a matter which the Dominion ought to deal with. . . Could it for a moment be contested, for instance, that if for the reasons of the public safety of the Dominion of Canada, it were desirable to prevent the manufacture and storing of gunpowder, or of dynamite, or any other thing that might be used for defensive or military purposes in Montreal, and if it were adjudged

[1] 2nd day, at p. 119. See p. 398, n. 1, *supra*.

by the Dominion of Canada unsafe that such should be permitted to be done or continued there at all, or without certain strict regulations, could it be argued for a moment that they could not pass an Act for regulating and storing gunpowder and munitions of war in the town of Montreal, or in the town of Quebec, because it did not transcend in mere area a definite locality, much smaller than a province, or within a province? The answer would be it is not a matter of a merely local or private nature, because the safety of Canada concerns the public, and it would be threatened by the storing of munitions of war, gunpowder, or dynamite in Montreal, because they might be seized by a foreign power coming from the sea, or by the United States from land, or if there were any public rising in Canada itself. . . . It therefore cannot be tested by looking at whether a thing occurs in a narrow locality, but whether it is not of a nature the interests of which transcend that locality, and which affect a more public interest than that of a single person or a single village."[1]

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Test is whether the interest transcends the locality.

Again, in Huson *v.* Township of South Norwich,[2] Strong, C.J., says:—"It is established by Russell *v.* The Queen,[3] that the Dominion being invested with authority by section 91 to make laws for the peace, order, and good government of Canada may pass what are denominated local option laws. But, as I understand that decision, such Dominion laws must be general laws, not limited to any particular province." But when, on the argument before the

[1] Cf. per Gwynne, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 212-3.

[2] 24 S.C.R. at p. 147, (1895).

[3] 7 App. Cas. 829, 2 Cart. 12.

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Privy Council on The Liquor Prohibition Appeal, 1895,[1] these words were quoted by Mr. Haldane, Lord Watson observed:—"I am not sure; it is always dangerous to lay down a proposition of that kind. I do not know that they must be general laws not limited to any particular province, that they must be for the benefit of the whole of the provinces. It is much too narrow to say that." Whereupon Lord Herschell said:—"But to legislate in a matter which is a local matter for one province only, and merely say we thought it would be for the benefit of all Canada that Ontario should be made a very sober place, would be to my mind legislation about which there would be a good deal of question. I think it is too narrow to say that the law must extend to every province; but, on the other hand, the general idea that it must not be local legislation in a particular province, though it is by the Dominion parliament——";[2] and Lord Morris interrupts with:—"I think the Chief Justice is only dealing with the local option laws. . . It is the local option laws, and I think he is strictly right."[3] And again, in the course of the same argument,[4] Mr. Edward Blake says, in words which may well be adopted as a correct summary of the whole matter:—"You have the powers limited, when you come to the province, by the area and the objects; provincial area and provincial objects are the scope. I think each one of the provincial powers is indicated in itself to be for provincial purposes. In-

Dominion laws need not extend to every province.

[1] Printed report, pp. 149-50. See, *supra*, p. 398, n. 1.

[2] And see, also, per Lord Herschell, *ibid.*, at p. 231.

[3] See, also, *ibid.* pp. 203-4; and the remarks of Lord Herschell, quoted, *supra*, pp. 507-9.

[4] Printed report, p. 229.

stead of setting that out generally at the commence- Prop. 51
ment, in each one of the articles it is specifically stated. But you find, on the contrary, unlimited, save by the express exception, general powers both as to scope, area, and objects in the Dominion. There is, therefore, as I submit, nothing whatever to indicate in the least degree that the power of the parliament of Canada was so limited as to those subjects on which it might enact that it could not, if the welfare of the whole community in its opinion demanded, enact with reference to particular parts of that community, the legislation which the condition of that part might, in the interest of all, specially demand. It is quite true that it was hoped and expected, and it was a reasonable hope and expectation, that, as a rule, the legislation would be general, extending over the whole area, the subjects being common. But there is nothing in these powers which prescribes any such limitation, and it is perfectly clear that the peace, welfare, and good government of the whole community may demand within the undisputed bounds of the legislative powers of the Dominion an Act of Parliament affecting directly not the whole area, not the whole community, but some part of that community, as to these matters on which the Dominion has power to legislate for all."[1]

Summary by Mr. Edward Blake

[1] On the argument in the Matter of the Dominion Liquor License Acts, 1883-4, before the Supreme Court of Canada, Ritchie, C.J., observed:—"If the Dominion parliament have the power to deal with this subject," (regulation of the liquor traffic), "surely they are not bound to make the same provisions for every county. They must judge of the necessities of each individual province, if they have the general power to deal with it": Dom. Sess. Pap., 1885, No. 85, p. 135. The view of the law expressed in the text is, of course, quite at variance with that of Mr. Justice Loranger, referred to *supra*, pp. 316-7, *q.v.* Cf. per Mathieu, J., in Export Lumber Co. *v.* Lambe, 13 R.L. at pp. 88-9, (1885), who, referring to section 91 of the British North America Act, says:—"Le mot 'exclusif' ne doit pas être pris à la lettre, mais doit seulement s'interprêter comme manifestant l'intention des provinces que le parlement du Canada aurait le pouvoir exclusif de faire des lois pour toutes les provinces et pour l'Union, mais seulement pour l'Union sur les sujets qui y sont mentionnés."

PROPOSITIONS 52, 53, and 54.

52. As to matters coming within the classes of subjects enumerated in section 91 of the British North America Act, over which the exclusive legislative authority of the Parliament of Canada is declared to extend, there is not to be found one word expressing or implying the right to interfere with Provincial executive authority.

53. We are not to assume, without express words or unavoidable implication, that it was the intention of the Imperial Legislature to confer upon the Dominion Parliament the power to encroach upon private and local rights of property, which by other sections of the Act have been especially confided to the protection and disposition of another legislature.[1]

54. When a question arises as to whether the Dominion Parliament has power in any case over any property or

[1] It is well to note at once that the rule of law embodied in this Proposition has not yet, at the time of going to press, come before the Privy Council. It will doubtless do so on the pending appeal from the decision in *In re* Provincial Fisheries, 26 S.C.R. 444, in which the Supreme Court uphold it.

civil rights in a Province, it is always necessary to form an accurate judgment upon what is the particular subject-matter in each case, for the extent of the control of Parliament over the subject-matter may possibly be limited by the nature of the subject. Prop. 52-4

Decisions upon questions arising under the sections of the British North America Act relating to public property referred to and discussed.

Dominion powers and provincial property.

Proposition 52 is in the words of Ritchie, C.J., in Mercer *v.* The Attorney-General of the Province of Ontario,[1] who adds the words "or property and its incidents." And no doubt, as the Privy Council say in St. Catharines Milling and Lumber Co. *v.* The Queen[2]:— "There can be no *a priori* probability that the British legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets." But it is submitted that there may be cases where, in accordance with the principle embodied in Proposition 37, the Dominion parliament may have power to interfere with provincial property in order to the effectual exercise of the enumerated powers conferred upon it by section 91. A case in

[1] 5 S.C.R. at p. 638, 3 Cart. at p. 29, (1881). Cf. per Ritchie, C.J., S.C., 5 S.C.R. at p. 644, 3 Cart. at p. 33. See, also, Prop. 8.

[2] 14 App. Cas. at p. 59, 4 Cart. at p. 125, (1888).

Prop. 52-4 point is suggested by Booth *v.* McIntyre,[1] where the question is mooted whether the Dominion parliament cannot confer on those railway companies which are within its exclusive jurisdiction the right of constructing their line through the waste lands of the Crown in the several provinces through which they run without obtaining the permission of the Lieutenant-Governor in Council, though that may be prescribed as necessary by Act of the province, as by R.S.O., 1877, c. 165, s. 9, s-s. 3, in respect to all railways subject to the legislative authority of the province. And it may be well also to recall in this connection section 117 of the British North America Act which provides that:—"The several provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

Dominion railways and provincial lands.

Dominion powers and provincial property.

Prop. 53. Proposition 53 is in the words of Strong, J., in The Queen *v.* Robertson,[2] who observes that it is analogous to the well-recognized principle in regard to the interpretation of statutes, that we are to assume

[1] 31 C.P. at p. 193, (1880).

[2] 6 S.C.R. at p. 134, 2 Cart. at p. 107, (1882). See, also, *supra* pp. 24-5. This case is referred to in Venning *v.* Steadman, 9 S.C.R. 206, per Strong, J., at p. 214, per Fournier, J., at pp. 221-2, and per Henry, J., at pp. 224-5, who, at p. 226, observes that Parliament might have power to require people to take out licenses to fish on their own lands, though he curiously adds that such "extreme right" of legislation "could only be exercised where there was an extreme public necessity for it," as to which see Proposition 17 and the notes thereto. In Phair *v.* Venning, 22 N.B. 362, where the judges also discuss the Queen *v.* Robertson, Palmer, J. (at p. 372), says that he thinks that "a law that would prevent a person using his fishery at any time or in any way without the authority of the Dominion government, would be a law wholly destructive of the property in the fishery, and consequently an absorption of the whole powers of the local legislature to make laws relating to that property," and would be *ultra vires* of the Federal parliament.

nothing calculated to impair private rights of owner- Prop. 52-4
ship, unless compelled to do so by express words or necessary implication; and in conformity with it the Supreme Court held in that case that the British North America Act, in assigning to Parliament the right to legislate with respect to 'sea coast and inland fisheries,' did not thereby give authority to deal with questions of property or civil rights, such as the ownership of the beds of the rivers or of the fisheries, or the right of individuals or the provinces therein; for that, in the words of Strong, J.,[1] there was no difference in this respect "between the rights of private owners which had been acquired by grant from the Crown before Confederation, and the rights of the provincial governments in respect of fisheries in non-navigable rivers, the beds of which, not having been granted, were vested in the provinces at that date"; and in the words of Ritchie, C.J.,[2] that "any lease granted by the Minister of Marine and Fisheries to fish in such fresh water non-tidal rivers, which are not the property of the Dominion, or in which the soil is not in the Dominion, is illegal."[3]

The Queen v. Robertson

'Sea coast and inland fisheries.'

And this decision and the rule of interpreta- No. 12 of sect. 91 of B.N.A. Act.
tion of the Dominion powers expressed in Proposition 53 have recently been followed and reaffirmed by the Supreme Court in *In re* Provincial Fisheries,[4] (Gwynne, J., however, dissenting, whose view will be referred to presently),

[1] 6 S.C.R. at p. 135, 2 Cart. at p. 108.

[2] 6 S.C.R. at p. 126, 2 Cart. at p. 98.

[3] Notwithstanding section 4 of the Dominion Fisheries Act, R.S.C., c. 95, which provided:—"The Minister of Marine and Fisheries may, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued fishery leases and licenses for fisheries and fishing wheresoever situated or carried on, etc."

[4] 26 S.C.R. 444.

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in answer to questions submitted on behalf of the Governor-General under R.S.C., c. 135, as amended by 54-55 Vict., c. 25, s. 4,[1] as to the jurisdiction of the Dominion parliament to authorize the giving by lease, license, or otherwise of the right of fishing in navigable or non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to private proprietors before Confederation, or not having been so granted are assigned to the provinces under the British North America Act. The Court follows Queen *v.* Robertson, and holds that the legislative authority of Parliament under section 91, No. 12, of the Act, is confined to the conservation of the fisheries, by what may be conveniently designated as police regulations,[2] and that the Dominion has no such right of leasing or licensing in the case either of navigable or non-navigable, tidal or non-tidal waters.[3]

Power to grant fishing leases.

And the view expressed by Ritchie, E.J., in Windsor and Annapolis R.W. Co. *v.* The Western Counties R.W. Co.,[4] presently to be again referred to, seems to be in conformity with the Proposition under consideration, namely, that though the Dominion parliament has unquestionably the right to legislate as to and dispose of any property belonging to the

[1] As to 54-5 Vict. c. 25, s. 4, D., see *supra* p. 126, n. 2. In *In re* Provincial Fisheries, Taschereau, J., declined to answer two of the questions submitted, saying:—"The words 'important questions of law or fact touching provincial legislation,' in 54-55 Vict., c. 25, s. 4, mean, in my opinion, touching provincial legislation enacted since Confederation, and the words 'touching any other matter' mean any other matter of the same nature, *i.e.*, on the law, either federal or provincial, since Confederation. But I do not think that under the intent of that enactment we are called upon to determine what was the law in any of the provinces before Confederation:" 26 S.C.R. at p. 540.

[2] See, *supra*, p. 556, n. 2.

[3] Excepting presumably as to the water in harbours, the beds of which, as will be presently seen, they reaffirm Holman *v.* Green, 6 S.C.R. 707, 2 Cart. 147, in holding to be the property of the Dominion.

[4] Russ. Eq. at p. 307.

Dominion[1] it has only the right "to dispose of the interest it may have in such property." The question before him was as to the right of the Dominion parliament to legislate in relation to the Windsor Branch railway, a provincial railway which had passed to it at Confederation under schedule 3 and section 108 of the British North America Act, in derogation of certain running powers and other rights over it granted or leased to a certain private railway before Confederation. Ritchie, E.J., says:—"If, for instance, when the Windsor railroad was originally made over to the Dominion the right to the use of it at a rent had been reserved to the province of Nova Scotia for a period of years, could the Dominion government dispose of the interest so reserved to the province? Clearly not, and, if not, neither could they dispose of the interest of their lessee which was so reserved. While property of the Dominion is one of the subjects over which the parliament of Canada has the power of legislating, private property and civil rights were placed within the powers of the local legislature, and private property and civil rights are both invaded by this Act, if the right to the possession of the railroad in question belongs under this agreement to the plaintiffs?"[2]

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Dominion powers in respect to Dominion property.

[1] See section 91, No. 1, of the British North America Act.

[2] See, however, *infra* at pp. 588-90. See, also, *supra*, pp. 18-20, as to the views expressed by Fisher, J., in The Queen *v.* The City of Fredericton, 3 P. & B. at pp. 169-70, (1879). In Bayer *v.* Kaizer, 26 N.S. 280, (1894), where the plaintiff had had his nets seized and forfeited for not having them raised so as to allow of the free passage of fish between the hours mentioned in R.S.C., c. 95, s. 14, s-s. 14, the County Court judge of the district of Halifax held that forfeiture and confiscation were not necessary to the working of the Fisheries Act, and that the above provision in that regard was *ultra vires* of the Dominion parliament, as a manifest interference with property and civil rights. It appears, however, that on appeal to the Supreme Court of the province, counsel for the plaintiff virtually admitted that the judgment

Dominion fishery legislation.

Prop. 52-4

It is well to observe, however, that in Robertson *v.* Steadman,[1] which may be said to mark the inception of the litigation which terminated in The Queen *v.* Robertson in the Supreme Court of Canada, the Supreme Court of New Brunswick, (Fisher, J., dissenting), had arrived at a different conclusion from that in the latter case, and held that the Dominion parliament had power to grant the exclusive right to fish in the non-tidal river there in question, the bed of which was vested in the province. Allen, C.J., delivering the judgment of the Court says, (at p. 631):—"I understand the Imperial parliament to say, in effect, in the 92nd section, that all matters affecting property and civil rights in the province shall be under the control of the provincial legislature, unless they relate to some of the matters over which the exclusive legislative authority has

Dissenting opinions as to Dominion powers over property rights.

could not be sustained on this point. As to the enactment in R.S.C., c. 95, s. 17, s-s. 4, that in discharge of his duties any fishery officer may enter upon or pass through or over private property without being liable to trespass," Graham, E.J., says, in this case, (p. 289):—"When there is power to regulate the inland fisheries, it is absolutely necessary, in order to have the regulations carried out, that power should be given to go on private property," and he holds that the power of forfeiture was similarly necessary. As to this case it further appears that the County Court judge held the decision of the Supreme Court in Queen *v.* Robertson to have established that fresh non-tidal waters which are not the property of the Dominion, or in which the soil is not in the Dominion, are not 'inland fisheries' within the meaning of No. 12 of section 91. But the Supreme Court of the province took a different view, upholding the jurisdiction of the Dominion parliament to pass the legislation under which the plaintiff's nets were seized, though the locus was a fresh non-tidal water. See this case also discussed in an article on sea coast and inland fisheries, 13 C.L.T. 231. In *In re* Provincial Fisheries, 26 S.C.R. at p. 540, however, Taschereau, J., also speaks as though he thought provincial legislatures might have a jurisdiction over fisheries in non-navigable rivers and lakes, which they would not have over those in navigable waters, but the other judges indicate no such view, nor is Taschereau, J., explicit as to his. An appeal in this case to the Privy Council is pending as this goes to press. And see as to forfeiture of fishing materials, Mowat *v.* McFee, 5 S.C.R. 66, (1880).

Dominion fishery legislation.

[1] 3 Pugs. 621, (1876).

been given to the Dominion parliament by the 91st section."[1] Prop. 52-4

And in *In re* Provincial Fisheries, Gwynne, J., emphatically dissents from the principle of construction expressed in Proposition 53, as interpreted by the judgment of the Supreme Court in Queen *v.* Robertson, saying:[2]—"No jurisdiction is given to the provincial legislatures, or any of them, over anything whatever under the term 'fisheries.' Whatever comes within that term is given exclusively to the Dominion parliament, and that term as used in item 12 of section 91 comprehends, in my opinion not merely regulations for the protection of the fish and prescribing the times and seasons and modes of fishing, but also provisions for . . . granting leases or licenses to take fish at certain places or in certain waters, to as full an extent, in short, as the parliament of the late province of Canada, or of the several other provinces, prior to Confederation, could have done within their respective provinces. 'Fisheries' being provided for specially in section 91, none of the powers conferred on provincial legislatures by the items enumerated in section 92 can in any manner detract from, qualify, or affect the power vested in the Dominion parliament over whatever comes within the term 'sea coast and inland fisheries.' This is the plain result of the last clause of section 91.[3] . . . There is no difficulty

Dissenting opinion as to Dominion power to grant fishing leases.

[1] See the words of the Privy Council in Tennant *v.* The Union Bank of Canada, [1894] A.C. at p. 45, noted, *supra*, pp. 427-9; also, *supra*, pp. 432-5. When the case of Steadman *v.* Robertson, 2 P. & B. 580, (1879), came before the Supreme Court of New Brunswick, somewhat differently composed, the majority came to a different conclusion from that in Robertson *v.* Steadman just referred to, and held as did the Supreme Court of Canada in The Queen *v.* Robertson, Weldon, J., who sat in both cases, having apparently changed his opinion.

[2] 26 S.C.R. at pp. 542-4, (1896).

[3] As to which see Proposition 59 and the notes thereto.

Prop. 52-4 whatever that I can see in holding the 'fisheries' in inland waters to be placed *exclusively* under the jurisdiction of the Dominion, even though the beds of those waters may be the property of the provinces, and I can see no principle whatever upon which the term 'sea coast and inland fisheries' should be given a limited construction, or upon which language used in prescribing the limits of the jurisdiction of the Dominion parliament should be construed in the narrowest and most limited sense, while the language used in prescribing the limits of the jurisdiction of the provincial legislatures should be construed in a most unlimited sense."[1] On the appeal to the Judicial Committee in this case, pending as this portion of the present work goes to press, one or other of these conflicting views of the proper construction of the British North America Act in this important matter will no doubt be finally determined.

Dominion powers over property rights.

Prop. 54. Passing now to Proposition 54, it is suggested by the words of Gwynne, J., in The Queen *v.* Robertson,[2] and he explains his meaning as follows:—"For example, the first item enumerated in the 91st section as placed under the exclusive control of the Parliament is 'the public debt and property,' and by section 108 the provincial public works and property are declared to be the property of Canada. The jurisdiction of Parliament over such property is in virtue of the subject-matter being the property of Canada; but if Parliament should so legislate as to dispose absolutely by sale of portions of this property from time to time, it may well be that the property so sold, when it should become the prop-

[1] All this is in accordance with Gwynne, J.'s views expressed in The Queen *v.* Robertson, 6 S.C.R. at p. 65, *et seq.*, 2 Cart. at p. 119, *et seq.*, (1882).

[2] 6 S.C.R. at pp. 65-6, 2 Cart. at pp. 119-20, (1882).

erty of individuals, should be no longer subject to the control of the Dominion parliament any more than any other property of an individual should be."[1] Prop. 52-4

But as Gwynne, J., goes on to observe, over most of the subjects enumerated in the 91st section, the right of the Dominion parliament to legislate is wholly irrespective of there being any property in the several subjects vested in the Dominion; and so in St. Catharines Milling and Lumber Co. *v.* The Queen,[2] where it was urged in favour of the Dominion that, inasmuch as No. 24 of section 91 of the British North America Act in express terms confers on the parliament of Canada power to make laws in relation to 'Indians and lands reserved for the Indians,' the exclusive power of legislation and administration carries with it by necessary implication any patrimonial interest which the Crown might have had in the reserved land, the Privy Council held the contrary, and that under section 109 of the Act the proprietary interest of the Crown in lands reserved to Indians at the time of Confederation passed to the respective provinces. They say:[3]— "There can be no *a priori* probability that the British legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the provinces of rights

Dominion legislative power and provincial property.

Indian lands

[1] And so in Attorney-General of British Columbia *v.* The Attorney-General of Canada, 14 App. Cas. at p. 302, 4 Cart. at pp. 249-50, (1889), where the Privy Council were dealing with the rights of property of the Crown, as represented by the Dominion government, in what is known as the Railway Belt in British Columbia, they say:— "The object of the Dominion government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the provincial government in the ordinary course of its administration."

[2] 14 App. Cas. 46, 4 Cart. 107, (1888).

[3] 14 App. Cas. at p. 59, 4 Cart. at p. 125.

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which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title." And so in the same case in the Ontario Court of Appeal, Patterson, J.A., says[1] that it is clear from reading section 108, and the third schedule therein referred to, along with section 91, "that in the scheme of the Act the vesting of property in the Dominion as against the provinces was not intended to follow or to be inferred merely from the bestowal of exclusive legislative jurisdiction over the subjects with which the property was connected. Thus while exclusive legislative power is given over postal service, militia, military and naval service and defence, beacons, buoys, lighthouses and Sable Island, navigation and shipping, the schedule expressly enumerates post offices,[2]

Vesting of property not to be inferred from gift of legislative power.

[1] 13 O.A.R. at p. 170, 4 Cart. at p. 211.

No. 8 of Sched. 3, of B.N.A. Act.

[2] No. 8 of schedule 3 of the British North America Act, by the aid of section 108, makes the property of Canada, 'custom houses, post offices, and all other public buildings, except such as the government of Canada appropriates for the use of the provincial legislatures and governments.' A question arose in 1893 as to the effect of this on a New Brunswick Act, which assumed to declare the rights of the Crown in respect to what was therein described as 'Government House property,' the Act being reserved for the signification of the Governor-General's pleasure. By order in Council of February 11th, 1870, the property had been appropriated by the Dominion government to the use of the government and legislature of the province of New Brunswick, and in a report, as Minister of Justice, on the Act, dated January 26th, 1893, Sir John Thompson expresses the view that:—"That order in Council constituted an appropriation of the property in question within the meaning of the statute, changing its character and converting it *sub modo* into public property of the province. It did not, as the Minister thinks, vest an absolute title in the Crown in right of the province, but gave the use thereof to the provincial authorities for

ordnance property, armouries, drill sheds, etc., light-houses, piers and Sable Island, harbours, river and lake improvements, etc.[1] There is, however, nothing answering in the schedule to the 'lands reserved for Indians' over which, by article 24 of section 91, Parliament has exclusive legislative jurisdiction."[2] Prop. 52-4

the purpose specified in the order in Council. He admits that he cannot assert that the matter is free from doubt, but submits any such doubt should not be set at rest by a provincial statute asserting the provincial view, and recommended that no action be taken on the Bill: Hodgins' Provincial Legislation, 2nd ed. at pp. 757-8.

[1] The recent Supreme Court decision in the provincial fisheries jurisdiction case (*In re* Provincial Fisheries, 26 S.C.R. 444), overrules, as one may, perhaps, surmise the Privy Council will do on the pending appeal, the peculiar contention which has from time to time been advanced by the Dominion government that the words 'rivers and lake improvements' mean not 'river improvements' and 'lake improvements,' but 'rivers, and lake improvements,' thus making all rivers ungranted before Confederation the property of the Dominion. Girouard, J., says (26 S.C.R. at p. 565):—"The text has no punctuation. The 's' thrown in at the end of the word 'river' is, to my mind, a clerical error or misprint. It is not to be found in the Quebec Conference resolutions, nor in the address of the provinces to the Queen praying for the Confederation Act, which read 'river and lake improvements.' When the Act was first published in the two official languages in Canada the Dominion authorities adopted as correct the following translation, 'améliorations sur les lacs et rivières,' which is also to be found in the address of the provinces to the Imperial parliament." All the judges were evidently of the same opinion; and so, also, per Gwynne, J., in Queen *v.* Robertson, 6 S.C.R. at pp. 98-9, 2 Cart. at p. 144; Doutre on the Constitution of Canada at pp. 351-2. See, also, Pope's Confederation Documents at p. 108, from which it seems that the word 'rivers' first appeared in the London Resolutions of December 4th, 1866. And for reports of Ministers of Justice in which the beds of all rivers ungranted at the time of the passing of the British North America Act have been claimed as the property of Canada and not to be interfered with by provincial legislatures, see Hodgins' Provincial Legislation, 2nd ed. at pp. 764, 1122, 1147. No. 5 of Schedule 3, of B.N.A. Act. 'Rivers and lake improvements.'

[2] A writer in 12 C.L.T. 163 observes of the case of St. Catharines Milling and Lumber Co. *v.* The Queen that:—"It is left undecided whether a province could of its own motion and power extinguish the Indian rights. But apparently it could not. To permit that would be to permit an interference with the direct powers of legislation granted to the Dominion parliament." See, however, per Burton, J.A., S.C., 13 O.A.R. at p. 167, 4 Cart. at p. 208, who considers that provincial authorities undoubtedly have the power to extinguish the Indian title. The further point presents itself whether the legislative power of the provinces over such lands when divested of the Indian title is not controlled and limited by the provisions of any treaties made with the Power to extinguish Indian title.

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A further illustration of Proposition 54 is supplied by the words of Ramsay, J., in Dobie *v.* The Tem-

Treaties prior to surrender.

Indians at the time of their surrender. At all events the Dominion government would doubtless in all cases protect the rights of the Indians under such treaties by exercise of its veto power, as it did in the case of an ordinance of the North-West Territories of 1889, which assumed to restrict rights of hunting contrary to such treaties, and which was disallowed pursuant to the report of Sir John Thompson as Minister of Justice, of August 1st, 1890: Hodgins, *ibid.* at pp. 1254-6. And so on similar grounds a British Columbia Act of 1874, relating to Crown lands in the province, but making no reservations for the Indian tribes, was disallowed: Hodgins, *ibid.* at pp. 1024-8, *q.v.*, on the general subject of the Indian title. As to that title in Canada being a mere burden on the proprietary estate of the Crown in the lands, and to be ascribed, except in special instances, to the general provisions of the royal proclamation of October 7th, 1863, and as to such Indian

Nature of Indian title.

lands being, before surrender, vested in the Crown subject to 'an interest other than that of the province in the same,' within the meaning of section 109 of the British North America Act, the tenure of the Indians, however, being only a personal and usufructuary right, dependent upon the goodwill of the Sovereign, see St. Catharines Milling and Lumber Co. *v.* The Queen, 14 App. Cas. 46, 4 Cart. 107, (1888). The fact that under the treaty of surrender, it may still possess exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of the beneficial interest in the timber which passes to the province: S.C. 14 App. Cas. at p. 60, 4 Cart. at p. 126. Lands sur-

Effect of surrender.

rendered by Indians to the Crown, though for a consideration in the nature of an annuity by way of interest accruing from the proceeds of the sale of the lands, do not come within No. 24 of section 91 of the British North America Act as 'lands reserved for Indians,' but, on such surrender, become ordinary unpatented lands, and upon being sold to private purchasers are liable to assessment under provincial Acts, even before patent granted: Church *v.* Fenton, 28 C.P. 384, 1 Cart. 831, 4 O.A.R. 159, 5 S.C.R. 239, (1880). Where a tribe of Indians was entitled to enjoy the constituted rents of a certain seigniory, it was held by the Court of Queen's Bench, at Montreal, that though the naked property or naked right of ownership of the constituted rents was vested in the Crown as represented by the province of Quebec, that

Dominion powers over Indians.

province held them subject to the usufruct or enjoyment of the Indians, being an interest other than that of the province in the same within the meaning of section 109 above referred to, and that it pertained to the Dominion government to sue for and collect the arrears of such rents, that government being entrusted with the administration of the affairs and property of the Indians in Canada, the power to legislate on a subject necessarily implying a right of administration respecting the matter of such subject; for that the Privy Council had now held in the Indian Claims case, (referring to the words of Lord Watson, 66 L.J.(P.C.) at p. 18 (1896), that the enumeration of subjects contained in sections 91 and 92 of the British North America Act, not only confers legislative power, but also defines the governmental powers and functions of the various governments: Mowat *v.* Casgrain, Jan. 20th, 1896, reported in *Montreal Gazette.* See Proposition 8 and the notes thereto. In New Zealand, also, the Crown is bound to recognize native proprietary right: *In re* Lundon and Whitaker Claims Act, 1871, 2 C.A. 41, at pp. 49-50, (1872). It

poralities Board,[1] that though by No. 13 of section 92 provincial legislatures may exclusively make laws in relation to property and civil rights in the province, this is not to be understood as giving them the power in relation to such property and civil rights as are necessary to the existence of a Dominion object. He says:—"In practice it never has been contended that property means all property. Railroad companies incorporated by Parliament, for instance, hold and manage their property under Dominion laws, and such companies evict people from their private property in the province under Dominion laws. No one will venture to affirm that a local Act could confiscate the property of a railway company incorporated by Parliament, or transfer it to another company or person. And so it has been decided in the case of Bourgoin *v.* The Montreal, Ottawa and Occidental R.W. Co.,"[2] that a railway with all its appurtenances, and all the property, liabilities, rights, and powers of the existing company, could not be conveyed to the Quebec government, and through it to a company with a new title and a different organization, without legislative authority, and that if the railway was a federal railway the Act authorizing the transfer must be an Act of the parliament of Canada. Nor by parity of reasoning could the local legislature confiscate the surplus funds of a bank on the pretext

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Property necessary to existence of a Dominion object.

The property of Dominion a ways.

has been there held that the right of conclusively determining when the native title has been duly extinguished is a prerogative right; that transactions with the natives for the cession of their title to the Crown are acts of State, and cannot be examined in any Court, and that the issue of a Crown grant implies a declaration by the Crown that the native title to the land has been extinguished, and is conclusive in all Courts against any person asserting that the land therein comprised was never duly ceded: Wi Parata *v.* The Bishop of Wellington, 3 J.R.N.S., S.C. 72.

A New Zealand case as to native tle.

[1] 3 L.N. at p. 248, 1 Cart. 381, (1880).

[2] 5 App. Cas. 381, 1 Cart. 233, (1880). See *supra* pp. 300-1.

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that it was property in the province. It is impossible to conceive more obvious limitations to the right to legislate as to property than these." The measure of the limitation, however, of the power of a provincial legislature over property of a railway company incorporated by the Dominion parliament or under Dominion control, must, it is submitted, be found in the application of the principle expressed in Proposition 37 and illustrated by the authorities referred to in the notes to that Proposition.[1]

Provincial powers in respect to Dominion railways.

[1] The degree to which railways incorporated by the Dominion parliament, or railways which, having been declared by that parliament to be for the general advantage of Canada, or for the advantage of two or more of the provinces, under No. 10, (c) of section 92 of the British North America Act, (see p. 603, n. 2, *infra*) are as effectually Dominion companies as if they had been originally incorporated by the Federal parliament, (see per Hall, J., in Baie des Chaleurs R. W. Co., *v.* Nantel, R. J. Q. 5 Q.B., at p. 69; Redfield *v.* Corporation of Wickham, 13 App. Cas. at p. 475; Larsen *v.* Nelson and Fort Sheppard R. W. Co., 4 B. C. at p. 156), are subject to be affected by provincial legislation has not been clearly determined. In Clegg *v.* Grand Trunk R. W. Co., 10 O. R. at p. 714, (1886), Cameron, C.J., holds himself "free to consider whether a Dominion corporation must not outside of its corporate powers and functions, be regarded as a simple entity, which is, as far as the exercise of civil rights are concerned not expressly provided for by the Act of incorporation, subject to the laws respecting such rights within the province, in which it may carry on its authorized business or exercise its corporate powers," (see notes to Prop. 55), and takes no notice of the peculiar position of Dominion railways, arising from the fact that under No. 29 of section 91, the Dominion parliament has expressly conferred upon it exclusive power to make laws in relation to them. In Monkhouse *v.* Grand Trunk R. W. Co., 8 O.A.R. 637, 3 Cart. 289, (1883), Spragge, C., held that an Ontario Act, 44 Vict. c. 22, which made provision for the safety of railway employees and the public by regulating the construction and maintenance of railway frogs would be *ultra vires* if intended to apply to a Dominion railway. The rest of the Court did not consider it necessary to deal with the constitutional question, but Patterson, J. A., 8 O.A.R., at p. 643, 3 Cart. at p. 296, carefully guards himself "from being understood to hold that a railway company incorporated under the laws of the Dominion or coming within the exceptions in the 10th article may not be affected by provincial legislation touching property and civil rights, or other subjects within the jurisdiction of the provincial legislatures." This decision was followed in Clegg *v.* Grand Trunk R. W. Co., 10 O.R. 708, (1886); Barbeau *v.* The St. Catharines and Niagara Central R. W. Co., 15 O.R. 586, (1888), the constitutional question not being discussed. See, also, *Re* Toronto, Hamilton, and Buffalo R. W. Co. *v.* Kerner, 28 O.R. 14, (1896). But in The Canada Southern R. W. Co. *v.* Jackson, 17 S.C.R., 316, 4 Cart. 451, (1890), the Ontario Workmen's Compensation for Injuries Act, 49 Vict. c. 28, was held to apply to a rail-

Act for protection of railway employees.

We may refer also here to the report of Sir John Prop. 52-4

ways though it had been declared a work for the benefit of Canada, for, says Patterson, J., 17 S.C.R., at p. 325, 4 Cart., at p. 458: "It is not legislation respecting such local works and undertakings as are excepted from the legislative jurisdiction of the provinces by article 10, section 92 of the British North America Act. It touches civil rights in the province. The rule of law which it alters was a rule of common law in no way dependent on or arising out of Dominion legislation, and the measure is strictly of the same class as Lord Campbell's Act, which, as adopted by provincial legislation, has been applied without question to all our railways." By his report of May 10th, 1892, however, Sir J. Thompson, as Minister of Justice, expresses doubt as to the validity of a British Columbia Act which purported to subject Dominion railway companies to the obligations and requirements of the provincial Fence Act, thereby extending the obligation of such companies beyond those imposed upon them by the Railway Act of Canada: Hodgins' Provincial Legislation, 2nd ed., at p. 1124. In Larsen *v.* Nelson and Fort Sheppard R. W. Co., 4 B. C. 151, (1895), it was held that the provisions of a provincial Mechanic's Lien Act were so inconsistent with those of the Dominion Railway Act, 1888, as to priority of mortgages upon railways, that it must be inferred they were not intended to apply to Dominion railways. In Baie des Chaleurs R. W. Co., *v.* Nantel, R. J. Q. 9 S. C. 47, 5 Q. B. 65, (1896), the Quebec Court of Queen's Bench held that a provincial statute which provided for the sequestration of the property of a railway company subsidized by the province, when such company was insolvent, or had not complied with its charter, or had ceased to work its road, and that the sequestrator should take possession and perform all acts necessary for the construction, maintenance, administration and working of the railway, and that if he had not the means at his disposal for that, the Court might order the sheriff to seize and sell the road and its rolling stock,—applied, and was *intra vires* as applying, to a railway company under the legislative jurisdiction of the Dominion parliament. The majority of the Court held the Act merely one of procedure in order to attain a judicial sale, and that its provisions were accessory to this end, Pagnuelo, J., the judge of first instance, whose decision was affirmed, observing that if there were a Dominion law providing for the liquidation of such insolvent railways, the provincial legislature could not interfere, but there was no such law. Hall and Wurtele, JJ., however, dissented and held the Act *ultra vires;* Hall, J., because the sequestration provided for was not merely of a preservative and temporary character, and as an interim procedure simply, in contemplation of a definite sale, but involved the administration and operation of the railway as a "going concern": R. J. Q. 5 Q. B., at pp. 70-2; and he refers to the case of Burgoin *v.* The Montreal, Ottawa and Occidental R. W. Co., 5 App. Cas. 381, 1 Cart., 233, *supra*, p. 595. Wurtele, J., took the ground that the Act was not one merely enacting rules of procedure for carrying on proceedings by which an existing right in the property of a federal railway was sought to be enforced (such, apparently, as a right to seize under a judgment), which he held would be *intra vires*—but created a right which did not exist when the railway was made a federal railway. As to the sale of a Dominion railway under a *fi. fa.*, see Redfield *v.* Corporation of Wickham, 13 App. Cas. 467, (1888). See also p. 445, n. 3, *supra.*

Workmen's Compensation for Injuries Act.

Fence Act.

Act as to sequestration of railways.

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Thompson, as Minister of Justice, of July 4th, 1887,[1] with reference to a Manitoba Act respecting the Red River Valley railway, by which power was given to appropriate so much of the public lands as should be deemed necessary for the purposes of the railway, wherein he reported that the public lands of Manitoba are for the most part, and with the exception of those especially transferred to the province, vested in Her Majesty in the right of the Dominion, and that it was not competent for the legislature of that province to authorize any one to enter upon and to appropriate for any purpose the lands so vested in Her Majesty in right of the Dominion, and accordingly recommended the disallowance of the Act, which was disallowed accordingly.

Manitoba Crown Lands

Provisions of the B.N.A. Act relating to vesting of public property.

And bearing in mind that by No. 1 of section 91 of the British North America Act exclusive legislative authority is conferred upon the Dominion parliament to make laws in relation to 'the public debt and property,' and by No. 5 of section 92, upon the provincial legislatures to make laws in relation to 'the management and sale of the public lands belonging to the province, and of the timber and wood thereon,' it will be appropriate to notice here certain reported decisions upon the proper interpretation and application of those sections of the British North America Act which distribute the public property.[2] And first as to section 108, which provides that 'the public works and property of each province enumerated in the third schedule to the Act shall be the property of Canada,' and as to the meaning of 'public harbours,' which are among the

[1] Hodgins' Provincial Legislation, 2nd ed. at pp. 855-6.

[2] See p. 6, n. 1, *supra*.

public works and property so enumerated.[1] In Holman *v.* Green[2] it was decided that under the term 'public harbours' were included all harbours, together with the bed and soil thereof, which the public have the right to use, and not only such as at the time of Confederation had been artificially constructed or improved at the public expense;[3] and where a grant of part of the foreshore of a natural harbour, used as such by the public, was made by the provincial government of Prince Edward Island subsequent to the admission of that province into the Union, the grant was held to be invalid. Ritchie, C.J., however,[4] though he holds with the rest of the Court that the soil of such public harbours as are referred to in schedule 3 of the Act became vested in the Dominion, says that it did so "as distinct from the franchise of a port, it being clear from Lord Hale 'that the franchise of a port may be in one person and the ownership of the soil within the limits of the port in another.'" And this decision of Holman *v.* Green has been followed

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'Public Harbours.'

[1] Schedule 3 consists "of public undertakings which might be fairly considered to exist for the benefit of all the provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purpose of national defence, and of 'lands set apart for general public purposes.' It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use:" St. Catharines Milling and Lumber Co. *v* The Queen, 14 App. Cas. at p. 56, 4 Cart. at p. 120, (1888). As to Indian lands see *supra* p. 593, n. 2.

[2] 6 S C.R. 707, 2 Cart. 147, (1881).

[3] It might possibly have been thought that 'public harbours' meant harbours which had been declared to be such by some executive act, some exercise of the *jus regium* as to harbours. See Dicey on the Crown, pp. 182-3, Brown *v.* Reed, 2 Pugs. 206, (1874), and Nash *v.* Newton, per Allen, C.J., 30 N.B. at p. 618-20, (1891). By his report of January 20th, 1889, the Minister of Justice recommended the disallowance (unless sooner repealed) of a New Brunswick Act to incorporate a company to construct a subway beneath the harbour of St. John, as interfering with the public property of Canada, citing Holman *v.* Green: Hodgins' Provincial Legislation, 2nd ed., at p. 748. But see The Queen *v.* The St. John Gas Light Co., 4 Ex. C.R. 326, (1895), at p. 338.

[4] 6 S.C.R. at p. 711, 2 Cart. at p. 151.

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by the same Court in the recent case, *In re* Provincial Fisheries,[1] Strong, C.J., observing :[2]—"The beds of public harbours, non-tidal as well as tidal, according to the case of Holman *v.* Green, which, as I have said, is binding upon me, are vested in the Dominion"; while Girouard, J., says[3] :—"Relying upon the authority of Holman *v.* Green, I am of the opinion that 'public harbours,' (whatever may be the meaning of the term within section 108 and the third schedule of the British North America Act, for I am not called upon to express any opinion upon that point under the order of reference), being the property of the provinces at the time of Confederation, became the property of the Dominion, and that, as such proprietor, the Dominion became the owner of the soil and of the fisheries therein. The same rule should be applied to canals, lighthouses, piers, Sable Island, ordnance property, lands set apart for general public purposes, and other public works enumerated in the third schedule, and also lands or public property assumed by the Dominion for fortifications or for the defence of the country under section 117." Taschereau, J., observes :[4]—"As to public harbours—are there any private harbours ?—I am bound by the decision in Holman *v.* Green to say that the beds thereof belong to the Dominion. If the question was not concluded by that case, I would say that the beds of public harbours belong to the provinces."[5]

'Public Harbours.'

Sched. 3 of B.N.A. Act.

Nash *v.* Newton[6] is another case on the subject

[1] 26 S.C.R. 444, (1896).

[2] At p. 535.

[3] At p. 564.

[4] At pp. 538-9.

[5] An appeal to the Privy Council in this case is pending as this goes to press.

[6] 30 N.B. 610, (1891).

of public harbours under the British North America Act. There it appeared that public money of the province of New Brunswick was between 1846 and 1851 expended in opening and improving a channel through a sea wall which separated a small body of water known as Dark Harbour in the Island of Grand Manan from the Bay of Fundy, and the question was whether it thereupon became a public harbour, and it was held that it did. As Allen, C.J., says, (p. 618) :—"It became then a harbour in fact, whether it had ever been so before or not." Prop. 52-4

A curious question under section 108 also arose in the Windsor and Annapolis R.W. Co. *v.* The Western Counties R.W. Co.[1] already referred to. The government and legislature of Nova Scotia prior to Confederation granted or leased certain running powers and other rights to the Windsor and Annapolis railway company, a private corporation, over a provincial railway known as the Windsor branch railway; and all the judges in the provincial Supreme Court, with the exception of one, agreed that though this provincial railway became vested in Canada under section 108 of the British North America Act, and schedule 3 thereof, it did so subject to the rights of the Windsor and Annapolis railway company; and on the case ultimately reaching the Privy Council this point was finally set at rest, for their lordships say that in their opinion section 108 "had not the effect of vesting in Canada any other or larger interest in these railways," (*sc.*, railways which were at Confederation the property of Nova Scotia), "than that which belonged to the province at the time of the What passes by 'Railways' in Sched. 3 of B.N.A. Act.

[1] Russ. Eq. 287, 383, 3 R. & C. 377, 2 R. & G. 280, (1878), 7 App. Cas. 178, 1 Cart. 397, (1882). See, *supra*, pp. 586-7.

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statutory transfer."[1] But the question then arose whether the Dominion parliament after Confederation could legislate in respect to the Windsor branch railway in such a way as to override and defeat the rights of the Windsor and Annapolis railway company above referred to. The Privy Council, when the case came before them, held that the Dominion Act in question did not do this, and therefore they expressed no opinion whatever on the point, which they called, however, "a question of difficulty and importance." But the judge of first instance (Ritchie, E.J.), though he took a similar view as to the proper import of the Dominion Act in question, says also[2] that the Dominion parliament has power to dispose only of the interest it may have in Dominion property, on the principle which has been already mentioned.[3]

Legislative power of Dominion over property transferred by Sched. 3.

Vested rights.

When the case came before the Supreme Court of the province all the judges except James, J., held that the Dominion Act in question was *ultra vires*, not upon the ground suggested by Ritchie, E.J., however, but upon the ground that the Windsor branch railway was not a railway coming within the exceptions mentioned in No. 10 of section 92 of the British North America Act. Sir William Young, C.J., delivering the judgment of the Court, says :—[4]

[1] Cf. per Sedgewick, J., in the Indian Claims case, The Province of Ontario *v.* The Dominion of Canada and the Province of Quebec, 25 S.C.R. at p. 532, (1895). There would seem to be a certain analogy in the holding of the Supreme Court in The Queen *v.* Moss, 26 S.C.R. 322, (1896), that if a province before Confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation, the Crown, as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.

[2] Russ. Eq. at p. 307.

[3] See, *supra*, at pp. 586-7, and Proposition 53.

[4] 3 R. & C. at p. 405.

"I have sought in vain for any such declaration," (*sc.*, by the parliament of Canada, that it was for the general advantage of Canada, etc.), "as to the Windsor branch, and as that branch neither connects our province with any other, nor extends beyond its limits, it seems to me that the power of legislation as to that branch belongs exclusively to the local legislature. This is not inconsistent with the ownership or property and the management of the branch being in the Dominion government, who would be protected from any ill-advised or hostile legislation by the acts of the Governor-General under sections 55 and 90," (*sc.*, of the British North America Act). On the other hand, James, J., the dissenting judge, held that the Dominion parliament had exclusive jurisdiction over the Windsor branch railway, it having declared that it "was of public advantage to the Dominion, by disposing of it to the Western Counties railway company as a valuable consideration for their building another line of railway which was considered to be greatly for the public advantage. This is the most emphatic declaration the legislature could possibly have given." Besides which he says[1]:—"Why should the Dominion parliament carefully set itself to do over again what had already been done by the British parliament? An Act for that purpose would read as follows:—'Whereas the British parliament, for the general benefit of Canada, has given her certain railways; therefore be it declared that those railways are for the general benefit of Canada.' Such an Act would be on its face a work of supererogation."[2] But, on

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Declaration as to a railways being for 'the general advantage of Canada.

No. 10, (c), of sect. 92, of B.N.A. Act.

[1] 3 R. & C. at p. 415.

[2] It thus appears that in the opinion of James, J., such a declaration may be implied in a Dominion Act, though not made in express words. But in *Re* Grand Junction R.W. Co. *v.* The County of Peterborough,

Prop. 52-4 the other hand, James, J., says:—"If the British

Declarations as to railways being for 'the general advantage of Canada.'

45 U.C.R. 302, 6 O.A.R. 339, (1880), three judges express the view that such declaration must be made in express words: per Cameron, J., 45 U C R. at pp. 316-7; per Burton, J.A., 6 O.A.R., at p. 341; per Patterson, J.A., *ibid.* at p. 349; and in the argument in a certain matter submitted by the Railway Committee of the Privy Council of Canada to the Supreme Court of Canada in 1888, known as *In re* Portage Extension of the Red River Valley Railway, Cas. Sup. Ct. Dig. 487, (see, *supra*, p. 140, n. 4), an opinion is quoted, (at p. 65), of Wurtele, J., from p. 549 of a work entitled Parliamentary Procedure of Quebec, to the effect that in accordance with the general rule of interpretation that enactments which cut down, abridge or restrain powers shall have a strict and limited construction, the exceptional legislative authority conferred upon the Dominion parliament by section 92, No. 10, (*c*) of the British North America Act, in conjunction with No. 29 of section 91,—"Cannot be exercised in a general, but only in a specific manner; that local works and undertakings can only be brought within the purview of that authority by name, and not by general terms or by implication." But at p. 112 of the argument Mr. Blake advances strong reasons why such an opinion cannot be sustained, being contrary to the scheme of No. 10 of section 92, which by both (*a*) and (*b*) excludes works by classes from the provincial legislature. And as to the effect of such declaration when made, see a letter in 22 C.L.J. 307. Mr. J. G. Bourinot, in his Parliamentary Procedure and Practice, 2nd ed., p. 667, says:—"The policy of Parliament has been for years in the direction of practically controlling the entire railway system of the Dominion, and during the session of 1883 the Government brought in a Bill which became law with the object of giving effect to that policy," referring to 46 Vict., c. 24, D., entitled 'An Act further to amend the Consolidated Railway Act of 1879, and to declare certain lines of railway to be works for the general advantage of Canada.' This policy of the Dominion has been made a cause of complaint by the provinces, "who had spent large sums of money for constructing railways to see them taken over by the federal authorities:" speech of Premier Mercier at the annual banquet of the Club National, Toronto *Mail*, July 3rd, 1890. Indeed the whole power given by section 92, No. 10, (*c*), to the Federal parliament, of withdrawing from provincial jurisdiction the local works situated within any province, was complained of as going beyond the intention expressed in Quebec Resolution No. 29,(11), and an amendment of the British North America Act in that respect demanded by the 6th resolution passed at the Interprovincial Conference at Quebec in 1887. See, *supra*, p. 196, n. 2. At p. 672 of his work above mentioned, Mr. Bourinot says that in 1882 the Dominion parliament took the further step of making a similar declaration with respect to works other than railways, namely, those of two electric light companies. In the argument in *In re* Portage Extension of the Red River Valley Railway just referred to will be found a very full discussion of the Dominion legislation as to railways in the above matter, and also of the proper interpretation and effect of No. 10, (*c*), of section 92, which Mr. Mowat, counsel for Manitoba, actually contends (p. 59) was not intended to include railways at all, (but see *ibid.* at p. 105), that the 'works' referred to in (*c*) was meant to apply to works not included in (*a*), and that in its real meaning, No. 10, (*c*), refers to works "which the Dominion parliament might be willing to undertake themselves, to sanction and to execute." And in *Re* Junction Railway

No. 10, (c), of sect. 92, of B.N.A. Act.

Similar declaration as to other 'works.'

North America Act did not pass the whole title,"[1] (*sc.*, to provincial railways), "to Canada, it did not, I think, pass the whole legislative jurisdiction; and we are driven to the singular and most anomalous position of being asked to decide that the British North America Act intended to vest in the Canadian government not only half a title, but a divided legislative jurisdiction."[2] It is strange, however, that none of these judgments take notice of the

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Co. and The County of Peterborough, 45 U.C.R. at p. 317, (1880), Cameron, J., also says:—"It may be that sub-section 10 has relation solely to works of a public character, to be undertaken at the public expense, and not to works of a quasi-private character, such as a railway to be constructed by a private company, in which view the Dominion parliament will be unable to give itself jurisdiction, and exclusive power of legislation would be confined to the local legislature under sub-section 11," (*sc.*, of section 92 of the British North America Act), "if that section in fact gives power to create a corporation, and is not confined to the making of a general law or laws under which companies with provincial objects may be incorporated." As to which see the notes to Proposition 55. In the result in *In re* Portage Extension of the Red River Valley Railway, the Supreme Court unanimously held that notwithstanding the Dominion Act referred to by Mr. Bourinot, the Manitoba legislature could authorize the construction of a railway wholly within the province, but crossing the Canadian Pacific Railway, (one of the railways specially declared by the said Dominion Act to be a work for the general advantage of Canada, as were also 'all branch lines or railways connecting with or crossing them or any of them'), the Railway Committee of the Privy Council first approving of the mode and place of crossing, etc.: Cas. Sup. Ct. Dig. 487. Their lordships, however, do not give their reasons. It is stated by Mr. Edward Blake on the argument that it was at one time thought, at an early period after the completion of the Canadian Constitution, that all railways were under the exclusive jurisdiction of the parliament of Canada. He states, however, that he did not consider the question open on that application, while Mr. Christopher Robinson, who was with him, refers to Grand Junction R.W. Co. *v.* The County of Peterborough, 8 S.C.R. at pp. 118-9, per Gwynne, J., who expresses doubt on the point, but seems to admit that the matter is not open to question now because of the long continued course of legislation which has been adopted by the different provinces, and which has been practically affirmed and confirmed by the Dominion parliament. As to which see Proposition 14 and the notes thereto; and as to legislation relating to the crossing powers of railways, see, *supra*, pp. 399, n. 1, 445-6; and Cie du Grand Tronce and Huard, R.J.Q. 1 Q.B. 501, (1892), esp. at pp. 506, 508.

'Works' in No. 10, (c), of sect. 92, B.N.A. Act.

Railways.

[1] He held that it did so, but, as already mentioned, the Privy Council decided otherwise.

[2] 3 R. & C. at p. 412.

Prop. 52 fact that by No. 1 of section 91 the exclusive power of making laws in relation to the public debt and property is assigned to the Dominion parliament; and the only question is, it is submitted, whether in legislating on such public property it can or cannot override any vested rights which the property was subject to before Confederation, as well of course as any to which it may become subject by Act of the Dominion government or parliament after Confederation, short of its ceasing altogether to be public property of the Dominion. And the answer to this question, it may be found, should now be in favour of the Dominion power, upon the principle of Proposition 37, and the authorities there cited.[1]

Dominion power over 'the public property.'

No. 1 of sect. 91, B.N.A. Act.

Proceeding now to section 109 of the British North America Act, which provides that 'all lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate and arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same,' there are some important decisions upon it to be noted. In the first place, however, it may be well to recall the words of the Privy Council in the St. Catharines

Sect. 109, of B.N.A. Act.

[1] In Kennedy *v.* City of Toronto, 12 O.R. 211, 4 Cart. 649, (1886), where certain ordnance lands had been granted in 1858 to the city of Toronto, subject to a trust for their maintenance as a public park for the benefit of the citizens for all time to come, Ferguson, J., held that the provincial legislature had power to enact that the city might alienate this land without regard to the trust, as a matter of 'property and civil rights in the province.' *Quære*, however, whether the holding would have been the same if what was construed as a trust had been, as was contended, a condition, in breach of which there would be a reverter to the Crown.

Milling and Lumber Co. *v.* The Queen[1], that :— "In construing these enactments," (*sc.*, of the British North America Act), "it must always be kept in view that where public land, with its incidents, is described as the 'property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." And also that in the recent case *In re* Provincial Fisheries,[2] the Supreme Court has decided that under 'lands' in this section are comprised the beds of all lakes, rivers, and other waters (except public harbours) within the territorial limits of the several provinces, which had not been granted by the Crown before Confederation, of every description; and that there is no distinction, as suggested in that case, in this respect, between salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes and other lakes, or the so-called great rivers, such as the St. Lawrence river, Richelieu, Ottawa, and other rivers, or between waters directly and immediately connected with the sea-coast and waters not so connected, or between other waters and waters separating (or so far as they do separate) two or more provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a

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All public property is vested in the Crown.

Ownership of beds of lakes and rivers.

[1] 14 App. Cas. at p. 56, 4 Cart. at p. 120, (1888).

[2] 26 S.C.R. 444, (1896). And see Queen *v.* Moss, 26 S.C.R. 322, (1896). See, also, *supra*, p. 600. As to a Crown grant derogating from a public right of navigation, see Queen *v.* Fisher, 2 Ex. C.R. 365, (1891); Queen *v.* St. Johns Gas Light Co., 4 Ex. C.R. 326, (1895), at p. 346; in *re* Provincial Fisheries, 26 S.C.R. at p. 575. But see Normand *v.* St. Lawrence Navigation Co., 5 Q.L.R. 215, 2 Cart. 231, (1879), and, *supra*, p. 563, n. 2.

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foreign nation.[1] Gwynne, J., however, speaks somewhat ambiguously, saying simply that the beds of all such waters not granted before Confederation are vested in Her Majesty, subject to the jurisdiction and control of the Dominion parliament in so far as may be deemed necessary by that parliament or required for creating future harbours or for the erections of beacons, piers, or lighthouses, or other public works hereafter to be constructed for the benefit of the Dominion and within the jurisdiction of the Dominion parliament, as, for example, bridges over navigable waters, railways, or the termini of railways and the like, and, in short, all other works placed under the jurisdiction of the Dominion parliament by virtue of the exception to item 10 of section 92, or otherwise; and also specially as regards the administration of the fisheries."[2]

Ownership of beds of lakes and rivers.

The foreshore and tidal waters.

[1] Girouard, J., observes in this case that it had been suggested that "the ownership of the lands covered by sea within the three miles limit, generally known as the foreshore, and of all lands covered by tidal waters, is subject, under section 109 of the British North America Act, to a 'trust' or 'interest' created by Magna Charta in favour of the public, which, since Confederation, is held and represented by the Dominion for the benefit of the people of the Dominion at large, and is under the control of the Dominion parliament." But he says the contention is not maintainable, and points out that even if the provisions of Magna Charta could be held to constitute any such 'trust' or 'interest,' the public interested in the foreshore fisheries before Confederation was the public of the province which held the same for its benefit only, and not the public of the Dominion, which had no existence: 26 S.C.R. at p. 569.

The law in the United States.

Doctrine of *ad medium filum*.

[2] 26 S.C.R. at p. 541. See, however, his words at pp. 544-5. Girouard, J., observes:—"In the United States it is well settled law that the title to all tidal waters and their beds and the fisheries therein is vested, not in the United States, but in the several States of the Union, subject to the regulations of Congress wherever connected with interstate or foreign commerce. Likewise in many of the States inland rivers and lakes navigable are, like tide waters, State public property:" S.C. 26 S C.R. at p. 555. In this case, too, the Supreme Court judgments affirm the view in accordance with several prior provincial decisions, that the rule, applicable to non-navigable water, that the riparian proprietors whose grants are bounded by the stream are entitled to property in the bed *ad medium filum* does not apply to the great lakes of Canada, or to rivers *de facto* navigable: see per Strong, C.J., 26 S.C.R. at p. 520, *et seq.*, with whom King, J., concurs; per Girouard, J., at

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And as to the words in the section under consideration 'lands, mines, minerals, and royalties,' in Attorney-General of Ontario *v.* Mercer,[1] the Privy Council decided that whether the word 'royalties,' extended to royal rights besides those connected with lands, mines and minerals, or not, a point which they were not called upon to decide, it certainly included royalties in respect to lands, such as escheats, and ought not to be restrained to rights connected with mines and minerals only; and so they held that lands in the province of Ontario escheated to the Crown for defect of heirs belonged, "in the sense in which the verb is used in the British North America Act," to the province and not to the Dominion;[2] and that this was one of the exceptions referred to in section 102 of the Act, whereby, subject to such exceptions, the general public revenues of the province were vested in the Dominion; for the profits and proceeds of sales of lands escheated to the Crown are part of the casual territorial rev-

'Lands, mines, minerals, and royalties.'

Escheats.

p. 548, *et seq.* Girouard, J., says that in most, if not all, the provinces the distinctions of the English common law had been removed by local legislation before Confederation.

[1] 8 App. Cas. 767, 3 Cart. 1, (1883).

[2] See *supra* at p. 607. A grant or conveyance of lands 'to the Dominion government' should be interpreted as though expressed to be 'to Her Majesty, her heirs and successors, in right of and for the use of her Dominion of Canada:' The Queen *v.* Farwell, 14 S.C.R. 392, (1887), (see especially per Strong, C.J., at p. 425), reversing the decision of Henry, J., *ibid.* at p. 404. And in Attorney-General of British Columbia *v.* Attorney-General of Canada, 14 App. Cas. 295, 4 Cart. 241, (1889), where the same grant or conveyance was in question as that in The Queen *v.* Farwell, namely, that by the province of British Columbia to the Dominion government of public lands along the line of the Canadian Pacific railway in furtherance of its construction, and in pursuance of the Articles of Union under which that province entered Confederation, the Privy Council say, (14 App. Cas. at pp. 301-2, 4 Cart. at p. 249):—"The title to the public lands of British Columbia has all along been and still is vested in the Crown. It seems clear that the only 'conveyance' contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands and to appropriate their revenues. It was neither intended that the lands should be taken out of the province, nor that the Dominion government

Grant to Dominion government.

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enues of the Crown.[1] And in the subsequent case of Attorney-General of British Columbia *v.* Attorney-General of Canada, known as the Precious Metals Case,[2] the Privy Council decided, in conformity with their prior decision, that this word 'royalties' in section 109 includes prerogative rights to gold and silver mines. Their lordships point out that the right of the Crown to land and the baser metals which it contains stands, according to the law of England, (which prevails in British Columbia, with which province they were concerned, so far as not from local circumstances inapplicable), upon a different title from that to which its right to the precious metals must be ascribed; the baser metals being regarded as *partes soli*, or as incidents

'Royalties' in sect. 109 of B.N.A. Act.

should occupy the position of a freeholder within the province." And in the same case in the Court below, Gwynne, J., observes :—"The government, from the nature of the Constitution of the Dominion, could not take lands by grant or otherwise, nor could it have the power of appropriation of the tract in question, otherwise than under the direction and control of the parliament of Canada : " 14 S.C.R. at p. 375, 4 Cart. at p. 274.

[1] In thus deciding the Privy Council affirmed the decision of the Quebec Court of Queen's Bench in Attorney-General of Quebec *v.* Attorney-General of the Dominion of Canada, (Church *v.* Blake), 1 Q.L.R. 177, 2 Q.L.R. 236, (1876), to which decision they make special reference. In his report of August 25th, 1885, upon the Manitoba Act, 47 Vict., c. 26, respecting escheats and forfeitures of estates of insolvents, Sir Alexander Campbell, as Minister of Justice, points out, (1) that in Attorney-General of Ontario *v.* Mercer, the Privy Council do not decide anything in respect of personal estate which escheats for want of next of kin; and (2) that that case is no decision in favour of Manitoba even with respect to escheats of land, saying as to this :—"Manitoba, when it became a province, was not possessed of any lands, mines, or minerals, and it was provided by section 30 of the Manitoba Act, 33 Vict., c. 3, that all ungranted or waste lands in the province should, from and after the date of the transfer, be vested in the Crown and administered by the government of Canada for the purposes of the Dominion, subject to the conditions contained in the agreement for the surrender of Rupert's Land by the Hudson Bay Company; from which it would appear to be clear that the 109th section of the British North America Act, 1867, is not applicable to that province;" and he recommended the disallowance of the Act in question : Hodgins' Provincial Legislation, 2nd ed., at pp. 838-9. See *ibid.*, pp. 853, 856.

Escheats of personal estate.

Escheats of land in Manitoba.

[2] 14 App. Cas. 295, 4 Cart. 241, (1889).

of the land in which they are found, and no prerogative being given to the Crown in regard to them, whereas all mines of gold and silver within the realm, whether they be in the land of the Crown or of subjects, belong to the Crown by prerogative. But as in Attorney-General of Ontario *v.* Mercer, so in this judgment, their lordships expressly refrain from considering whether 'royalties,' in section 109, includes *jura regalia* other than those connected with lands, mines, and minerals.[1]

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Gold and silver mines

With respect to the latter part of section 109, which provides that the lands, mines, minerals and

[1] The Privy Council held in this case that British Columbia, having agreed by the 11th Article of Union to convey, and having accordingly granted by statute to the Dominion parliament, certain 'public lands' in trust to be appropriated in furtherance of the construction of the Canadian Pacific railway—this not being matter of a separate and independent compact, but part of a general statutory arrangement, of which the leading enactment was that on its admission to the federal Union, British Columbia should retain all the rights and interests assigned to it by the provisions of the British North America Act, 1867, which govern the distribution of provincial property and revenue between the province and the Dominion, the 11th Article of Union being nothing more than an exception from these provisions—though the expression 'land' admittedly carried with it the baser metals, they being incidents of land, it should not be interpreted under the circumstances as derogating from the provincial right to 'royalties' connected with mines and minerals, *e.g.*, mines of gold and other precious metals. Therefore they held that the precious metals within the lands in question remained vested in the Crown, subject to the control and disposal of the government of British Columbia. Cf. Woolley *v.* The Attorney-General of Victoria, 2 App. Cas. 163, (1877). And see also Esquimalt and Nanaimo R. W. Co. *v.* Bainbridge, [1896] A.C. 561. In Queen *v.* Farwell, 3 Ex. C.R. 171, 22 S.C.R. 553, (1893-4), it was contended that the result of the views thus expressed by the Privy Council was that the lands in the railway belt in British Columbia were still vested in the Crown in right of the province, subject only to the right of the government of Canada to administer such lands and to take the revenues therefrom, and that all grants thereof must issue under the Great Seal of the province of British Columbia. Burbidge, J., however, overruled this contention, and held that letters patent for the public lands within the railway belt should issue under the Great Seal of Canada, (see 3 Ex. C.R. at p 289). In this he was affirmed by the Supreme Court, King, J., in delivering the judgment of the Court, saying :—"The rights of the Crown, territorial or prerogative, are to be passed under the Great Seal of the Dominion or province, (as the case may be), in which is vested the beneficial interest therein. Otherwise they cannot be said to be enjoyed by it, or under its control:" 22 S.C.R. at p. 561.

The Precious Metals case.

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royalties therein referred to shall belong to the several provinces, 'subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same,' the meaning of these latter words has been recently up for determination before the Privy Council in the Indian Claims case.[1] In 1850 certain Indians inhabiting districts now included in the province of Ontario entered into treaties with the government of the province of Canada, acting on behalf of Her Majesty and the government of the province, for the cession of certain tracts of lands which had until that time been occupied as Indian reserves, and the lands were accordingly surrendered in consideration of certain sums paid down and certain perpetual annuities, and on the further term and agreement that in

Sect. 109 of the B.N.A. Act.

'Subject to any trust,' etc.

Indian Claims case.

[1] Attorney-General for the Dominion of Canada *v.* Attorney-General for the Province of Ontario, 66 L.J. (P.C.) 11, (1896). This was an appeal from the award of certain arbitrators appointed for the final determination of questions which had arisen on the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, on the basis of those provisions of the British North America Act, (namely, sections 109, 111, 112, and 142), which relate to the incidence, after the Union, of the debts and liabilities of the old province of Canada. In the course of the argument, Lord Watson said of section 109:—"If the Crown right was subject to a burden upon the land, the interest is to pass to the province under that burden. There was to be no change in the position of the Crown. I think the whole effect of this clause is to appropriate to the province of Ontario all the interest in lands within that province as vested in the Crown, subject to all the conditions under which they were vested in the Crown:" Manuscript transcript from shorthand notes, 1st day, p. 27. And in another place he says:—"The policy of these sections of the Act, 109 and 112 and 111 and 142, when read together, appears to me to be generally this, beyond all dispute. . . The intention obviously was to provide that with regard to all those debts and liabilities of the old province of Canada, which were simply debts and liabilities charged generally upon the revenues of the provinces, the creditors were to be paid by the Dominion, and to a certain extent, in excess of a particular sum, the Dominion was to be recouped by the two new provinces in the proportions which might be determined under the provisions of section 142. On the other hand to this extent it is made plain—at least I hold it to be made very plain under section 109—that any debt or liability which was made a proper charge upon any property or assets passing to the province under section 109, was to remain that charge, and was not to be satisfied by the Dominion government, under section 111:" *Ibid.* at pp. 84-5.

Provisions of B.N.A. Act as to incidence of debts and liabilities of old province of Canada.

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case the territory ceded should at any future period produce an amount which would enable the government of the province, without incurring loss, to increase the annuities, then and in that case the sum should be increased from time to time on the scale therein provided; and the question was whether such right to augment an annuity constituted a 'trust' or 'interest' in respect to the lands in favour of the Indians, within the meaning of section 109. The judgment states:—"The expressions 'subject to any trusts existing in respect thereof,' and 'subject to any interest other than that of the province,' appear to their lordships to be intended to refer to different classes of right. Their lordships are not prepared to hold that the word 'trust' was meant by the legislature to be strictly limited to such proper trusts as a Court of Equity would undertake to administer; but, in their opinion, must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate or its proceeds, to make payment, out of one or other of these, of the debt due to the creditor to whom that duty ought to be fulfilled. On the other hand, 'an interest other than that of the province in the same' appears to them to denote some right or interest in a third party, independent of, and capable of being vindicated in competition with the beneficial interest of the old province. Their lordships have been unable to discover any reasonable grounds for holding that by the terms of the treaties any independent interest of that kind was conferred upon the Indian communities. . . Their lordships have had no difficulty in coming to the conclusion that under the treaties the Indians obtained no right to their annuities, whether original or aug-

Indian Claims case.

Meaning of 'trust,' and 'interest' in sect. 109 of B.N.A. Act.

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mented, beyond a promise and agreement, which was nothing more than a personal obligation by its Governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation, or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.[1]

'Trust' or 'interest' under sect. 109, B.N.A. Act.

Such a 'trust' or 'interest' as is referred to in section 109 was found, in Booth *v.* McIntyre,[2] to be the right possessed by the Canada Central railway, under its charter, comprised in Acts of the old province of Canada, to pass over any portion of the country between limits mentioned therein, and carry the railway through the Crown lands lying between the same. "The Crown lands through which their railway passed," says Osler, J., delivering the judgment of the Court, "were subject, it may be said, to a trust existing in favour of the company so long as they remained Crown lands, and to the interest of the company, being an interest other than that of the province in the same."[3]

As to Crown lands being subject to trusts.

[1] In his judgment in this case in the Supreme Court, 25 S.C.R. at pp. 524-5, (1895), Gwynne, J., held that the Crown's undertaking and promise constituted a trust obligation existing in respect of the proceeds arising out of the ceded territories within the meaning of section 109, "notwithstanding that letters patent of the said lands granted by the government of Canada would pass an absolute title in fee simple to the grantees thereof," and although "the estate of Her Majesty in the ungranted lands of the Crown in the province never were, nor were supposed to be, nor indeed could be, subject to any such trust." But as to Crown lands being bound by a trust, see per Strong, V.C., in Canada Central Railway Co. *v.* The Queen, 20 Gr. at pp. 289-90; per Killam, J., in Canadian Pacific Railway Co. *v.* Rural Municipality of Cornwallis, 7 M.R. at pp. 21-3; and McQueen *v.* The Queen, 16 S.C.R. at pp. 58, 117.

[2] 31 C.P. at pp. 193-4, (1880).

[3] Section 125 of the British North America Act specially provides

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Lastly as to provincial lands, in *In re* Provincial Fisheries,[1] it was held by all the judges, except Gwynne, J., that the provincial legislatures have jurisdiction to regulate times and modes of fishing in provincial waters, subject to any Dominion legislation in relation to sea coast and inland fisheries, Strong, C.J., placing this under the power of the provinces over the management and sale of the public lands of the province, (No. 9 of section 92), and their power to make laws in relation to all matters of a local or private nature in the province, (No. 16 of section 92);[2] and Girouard, J., referring it to the former power, and to their power over property and civil rights in the province, (No. 13 of section 92). Gwynne, J., however, dissents and says:[3]—"I do not think that any Act or part of an Act of a provincial legislature, passed for the purpose of aiding in the protection of fisheries as provided by an Act of the Dominion parliament, would be held to be *ultra vires* as being legislation upon a subject, namely, the 'fisheries,' which is exclusively within the jurisdiction of the Dominion parliament, however inoperative and unnecessary such provin-

Provincial lands.

Provincial fishery legislation.

Taxation and Crown lands.

that "no lands or property belonging to Canada or any province shall be liable to taxation;" and in Ruddell *v.* Georgeson, 5 W.L.T. 1, (1893), it was held that unpatented lands are not liable to be assessed or sold for taxes. Killam, J., however, at p. 2, held that the provincial legislature has the power to tax any interest in Dominion lands, legal or equitable, which the Crown has really conferred on a subject, but not where no estate or interest has been so conferred, and refers to Canadian Pacific R.W. Co. *v.* Rural Municipality of Cornwallis, 7 M.R. at p. 24, *q.v.*; and see S.C. in App., 19 S.C.R. at pp. 710-11.

[1] 26 S.C.R. 444, (1896).

[2] In Queen *v.* Robertson, 6 S.C.R. at p. 136, 2 Cart. at p. 109, (1882), the same learned judge expresses the view that the provinces "may, without special legislation, and in exercise of their right of property, restrict the use" of provincial fisheries, "in any manner which may seem expedient, just as freely as private owners might do."

[3] 26 S.C.R. at p. 545.

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cial legislation might be; but unless as so in aid of the legislation of the Dominion parliament, I am of opinion that the subject is not within the jurisdiction of the provincial legislatures."[1]

[1] Cf. *supra* pp. 538-40. Cf. also a report in 1884 of Sir A. Campbell, as Minister of Justice: Hodgins' Provincial Legislation, 2nd ed. at p. 1209. In *In re* Provincial Fisheries, Strong, C.J., thus sums up his conclusions:—"First, the beds of all such waters which remained ungranted at the date of Confederation were public lands belonging to the provinces within the limits of which the same were situated, and as such were by section 109 of the Confederation Act vested in the provinces respectively; secondly, so long as the property in the beds of this class of rivers remains ungranted, the right of fishing in such waters belongs to the public as of common right; thirdly, the Crown in right of the provinces can, however, grant the beds of such waters and streams, in which case the exclusive right of fishing, unless expressly reserved, passes to the grantee as an incident of the ownership of the soil in the bed, and the province can also grant an exclusive right of fishing in the same waters, distinct from and without any grant of the bed; fourthly, the parliament of the Dominion cannot by its legislation in any way affect or interfere with the rights of fishing in the waters before mentioned, nor with the title and rights of the provinces in respect of such waters and the fisheries therein, save as hereinafter mentioned; fifthly, neither the provinces, except in the case of the province of Quebec, nor the Dominion, can, without legislative authority, grant exclusive rights of fishing in tidal waters, but the legislatures of the provinces may authorize such grants as regards all tidal waters within the limits and jurisdiction of the provinces respectively; sixthly, the power of legislation conferred upon parliament by section 91, sub-section 12, is to be limited, in the manner defined in the Queen *v.* Robertson, to the conservancy and regulation of the fisheries and other matters there specified:" 26 S.C.R. at pp. 531-2. King and Girouard, JJ., seem to concur with him on all points, except that the latter holds, as has already been stated, that the restrictions of Magna Charta as to tidal waters had been removed before Confederation by colonial legislation in most, if not all, the provinces: 26 S.C.R. at p. 555, *et seq.* Taschereau, J., also seems to agree with Strong, C.J., so far as he touches the above points. See, also, *Ex parte Wilson*, 25 N.B. 209, (1885), at p. 211. And before leaving the subject of public property, reference may be made to per Tessier, J., in Attorney-General of Quebec *v.* Attorney-General of the Dominion, 2 Q.L.R. at p. 241, 3 Cart. at pp. 104-5, as to goods confiscated by custom laws accruing to the Crown as represented by the Federal government, while unclaimed stolen goods accrue to the provincial government, as also lands gained from the sea by accretion. The right to fines and penalties under the criminal law is in question upon the continued reference before the same arbitrators as the Indian Claims case came before, (see *supra* p. 612, n. 1), pending as this goes to press; and see the report of Sir J. Thompson of April 6th, 1887: Hodgins' *ibid.* at p. 1107. As to provincial legislatures, (and not the Dominion parliament, as it assumed to do by 32-33 Vict. c. 29), having power to legislate respecting the forfeiture of goods of a felon, under property and civil rights in the province, see Dumphy *v.* Kehoe, 21 R.L. 119, (1891), and *supra* p. 79, n. 2. *Sed quære* as to the Dominion parliament not being able so to legislate under the principle of Proposition 37.

Summary of conclusions reached in the Provincial Fisheries Jurisdiction case.

No. 12 of sect. 91, B.N.A. Act.

Goods confiscated for customs.

Accretion.

Fines and penalties.

Forfeiture for felony.

PROPOSITIONS 55, 56, and 57.

55. The Dominion Parliament can alone incorporate companies with powers to carry on business throughout the Dominion, and the business of companies so incorporated may have to do with property and civil rights, yet it cannot empower them to carry on business in any Province otherwise than subject to and consistently with the laws of that Province, [unless the business is such that power to make laws in relation to it is exclusively in the Dominion Parliament, under one of the enumerated heads of section 91 of the British North America Act].

56. The fact that Provincial Legislatures may have passed Acts relating to companies of a particular description, such, for example, as building societies, and defining and limiting their operations, does not interfere with the power of the Dominion Parliament to incorporate such companies, with power to operate throughout the Dominion.

57. The fact that a company incorporated under an Act of the Dominion

Prop. 55-7 Parliament with power to carry on its business throughout the Dominion, chooses to confine the exercise of its powers to one Province cannot affect its status or capacity as a corporation, if the Act incorporating the company was originally within the legislative power of the Dominion Parliament.

Constitutional questions especially relating to incorporated companies discussed.

Citizens Insurance Co. *v.* Parsons.

The judgment of the Privy Council in the Citizens Insurance Co. *v.* Parsons,[1] and that in Tennant *v.* The Union Bank of Canada,[2] read together, seem clearly to establish and illustrate the first of the above Propositions. In the former it was held that the Ontario Act, 39 Vict., c. 24, to secure uniform conditions in policies of fire insurance, bound fire insurance companies, whether incorporated by Imperial, Dominion, provincial, colonial or foreign authority, so far as it related to insurance on property within the province of Ontario, inasmuch as it was within the power of a local legislature to pass, by virtue of its jurisdiction over civil rights, under No. 13 of section 92 of the British North America

[1] 7 App. Cas. 96, 1 Cart. 265, (1881). For a discussion of the constitutional decisions affecting insurance companies, see the introductory chapter to Hunter's Insurance Corporation Act, 1892; also J. G. Bourinot's Parliamentary Procedure and Practice, 2nd ed., at pp. 95 *et seq.*, 670 *et seq.* See, also, *supra*, p. 568, n. 1. As to the action of a local legislature in a self-governing colony over-riding a royal charter of incorporation, (*e.g.* of a bank), within the limits of its jurisdiction, see Todd's Parliamentary Government in the British Colonies, 2nd ed., at at pp. 220-1; also *supra* p. 176 *et seq.*

[2] [1894] A.C. 31.

Act.[1] Their lordships say:[2] "It by no means follows . . that because the Dominion parliament has alone the right to create a corporation to carry on business throughout the Dominion,[3] it alone has the right to regulate its contracts in each of the provinces. Supposing the Dominion parliament were to incorporate a company, with power among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended that if such a company were to carry on business in a province where a law against holding land in mortmain prevailed, (each province having exclusive legislative power over property and civil rights in that province), that it could hold land in that province, in contravention of the provincial legislation; and, if the company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body.[4]

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Dominion companies may be subject to provincial law.

And in their subsequent judgment in Colonial Building and Investment Association *v.* The Attorney-General of Quebec,[5] the Judicial Committee re-affirm that the parliament of Canada can alone constitute a corporation with powers to carry on its

[1] The same thing had been previously held in the Ontario Courts in Billington *v.* The Provincial Insurance Co., 24 Gr. 299; Dear *v.* Western Assurance Co., 41 U.C.R. 553; Ulrich *v.* National Insurance Co., 42 U.C.R. 141.

[2] 7 App. Cas. at p. 117, 1 Cart. at p. 283.

[3] As to the Dominion power to incorporate companies to do business throughout the Dominion, see *supra* pp. 504-5.

[4] A Dominion corporation, of course, cannot be dissolved by a provincial Act: Bourgoin *v.* La Compagnie du Chemin du Fer de Montreal etc., 5 App. 381, 1 Cart. 233. See as to this case *supra* pp. 300-1.

[5] 9 App. Cas. at pp. 164-5, 3 Cart. at pp. 127-8, (1883).

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business throughout the Dominion, and again allude to the passage just cited from Citizen's Insurance Co. *v.* Parsons, and observe that in it they "had not in view the special law of any one province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a corporation could only exercise its powers subject to the law of the province, whatever it might be in this respect." And so they say of the corporation whose charter they were then considering:[1] "What the Act of incorporation has done is to create a legal and artificial person, with capacity to carry on certain kinds of business, which are defined, within a defined area, namely, throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of incorporation gives it capacity to do so."[2]

Thus a Dominion land company must conform to provincial law.

[1] 9 App. Cas. at pp. 165 6, 3 Cart. at pp. 128-9.

[2] Accordingly in Cooper *v.* McIndoe, 32 L.C.J. 210, (1887), a building society incorporated by Dominion statute with power to buy, sell and hold real estate in the different provinces of Canada was held, by the Quebec Superior Court, unable to maintain an action for specific performance of a contract for the sale of land, because it had not obtained power to acquire, hold and sell real estate in Quebec under the requirements of the law of that province. And cf. per Ritchie, C. J., in Citizens Insurance Co. *v.* Parsons, 4 S.C.R. at pp. 250-1, 1 Cart. at pp. 298-9; per Fournier, J., S.C., 4 S.C.R. at p. 281, 1 Cart. at p. 310. In Lindley's Law of Companies, 5th ed., at p. 913, it is said: "Suppose that a registered company is formed in England for the purpose of working mines or cultivating estates in a colony. If by the laws of that colony, a corporation cannot hold lands, the company will not be able to attain its object without obtaining special authority from the proper quarter to hold lands in the colony." The judgment of the Privy Council in Colonial Building and Investment Association *v.* The Attorney-General of Quebec, shows Tessier, J., to be in error, when he says in the Court below, 27 L.C.J. at p. 300, 3

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It may be observed that so far as any mere requirement of a license from the Crown is concerned, the opinion is expressed by Armour, C.J., in McDiarmid *v.* Hughes,[1] and concurred in by Street, J., that the Dominion parliament has power to enact that a license from the Crown shall not be necessary to enable corporations to hold land within the Dominion; and that a Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license. But from the subsequent decision of the Privy Council in The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick,[2] elsewhere noticed more at length,[3] and the view there taken of the provincial Executive, it would appear that the only license from the Crown which can enable corporations to hold land in the provinces, in which the provincial laws require such license, is a license from the Crown as represented by the provincial Executive, and that the Dominion parliament has no jurisdiction at all to dispense with such license,[4] unless incidentally to the exercise of one of its enumerated powers, such

As to license to hold lands in mortmain.

Cart. at p. 137: "The creation of a corporation for objects relating to and extending to (pour des fins touchant) property and civil rights, falls exclusively under the control of the local legislature, and to remove it therefrom the object of incorporation must be one, so to say, of inter-provincial law, that is to say, one in which the Federal parliament has the right to establish the rules of civil right and of property in all the provinces in a uniform manner." As the Minister of Justice states in a report of October 24th, 1895, (Hodgins' Provincial Legislation, 2nd ed., at p. 1006): "There are, of course, many powers which might be conferred upon a corporation by the parliament of the United Kingdom, or by the parliament of Canada, which could also be conferred by the legislature of the province." The question still remains whether the exercise of the powers so conferred is subject to provincial law or not.

[1] 16 O.R. 570, 4 Cart. 701, (1888).

[2] [1892] A.C. 437.

[3] *Supra* p. 92 *et seq.*

[4] See Proposition 7, 8, and 9, and the notes thereto.

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as the power assigned to it to regulate 'banking', as well as to incorporate a bank.

Tennant *v.* The Union Bank.

For, to return to the leading Proposition, the case of Tennant *v.* The Union Bank of Canada[1] suggests and illustrates the qualification at the end of it. As Mr. Dickey submits, in his report as Minister of Justice, of March 12th, 1896,[2] this case, and that of Attorney-General of Ontario *v.* Attorney-General of Canada[3] show that the rule of subjection of Dominion corporations to the law of the province wherein they carry on business does not apply so as to affect "Dominion corporations in the exercise of powers conferred upon them by Parliament and strictly relating to the subjects of legislation enumerated in section 91 of the British North America Act," and that the enumerated powers of Parliament may be fully exercised, although with the effect of modifying civil rights in the province; and further, that Parliament in legislating with regard to one of the enumerated classes of subjects, has power to enact ancillary provisions relating to those subjects, and affecting rights which, but for the enactment of such provisions by Parliament, would have been within the legitimate range of provincial legislation.[4] But to determine the precise scope of such Dominion powers, and how far the invasion, by way of ancillary provisions, of the provincial area may properly go, and how far a Dominion corporation, even though the business it is incorporated to carry on may come under one of the enumerated Dominion

As to Dominion companies dealing with Dominion subjects.

[1] [1894] A.C. 31. See the case referred to at length, *supra* pp. 427-9; also pp. 504-5.

[2] Hodgins' Provincial Legislation, 2nd ed., at p. 1010, referred to also *supra* at p. 505.

[3] [1894] A.C. 189.

[4] See Proposition 37 and the notes thereto.

powers, may, nevertheless, be subjected to provin- Prop. 55-7
cial enactments in certain respects, must no doubt always be a matter of difficulty.[1]

And notwithstanding the judgments of the Privy Council in Citizens Insurance Co. *v.* Parsons,[2] and The Colonial Building and Investment Association *v.* The Attorney-General of Quebec,[3] to which we have been referring, and notwithstanding it may be added their subsequent judgment in Bank of Toronto *v.* Lambe,[4] as which see Proposition 61 and the

[1] See *supra* at p. 447 et seq. In Cie du C. F. de La Baie des Chaleurs *v.* Nantel, M.L.R. 5 Q.B. at p. 71, (1896), Hall, J. says:—"The Bank of Montreal or the Bank of Toronto can own real estate in the province for the purpose of its business. The local legislature can make laws which will control such real estate, tax it for local purposes, establish the procedure under which it might be seized and sold upon an unsatisfied judgment against the bank or for non-payment of taxes, but it could not validly interfere with the manner in which the bank carries on in those premises its business of banking, for the power and franchise in this respect are acquired from Parliament. The local legislature could not legally put in force an Act stipulating that if the bank charged a rate of interest exceeding six per cent. or discontinued business for over 30 days, it should be liable to the appointment of a sequestrator who would take charge of, and continue, and extend its business under the direction and control either of the Executive of the provincial government, or even of a judge of the Superior Court." But Hall, J., in his judgment in this case dissented from the view of the majority of the court, which upheld a provincial Act providing for sequestration of Dominion railway companies under certain circumstances: see *supra* p. 597, n. And as to banks, in connection with the provincial power to regulate the tenure and conveyance of real estate, cf. per Maclennan, J. A., in Regina *v.* County of Wellington, 17 O.A. R. at pp. 449-51, (1890): none of the other judges however adopt the same view in that case; also cf. Bourinot's Parliamentary Procedure and Practice, 2nd ed., at pp. 130, 674; and per Dorion, C. J., in The Colonial Building and Investment Association *v.* The Attorney-General of the Province of Quebec, 27 L.C.J. at p. 303, 3 Cart. at p. 141. Also cf. *supra* p. 457, n. 2. And as to provincial powers in regard to Dominion railways generally, see *supra* pp. 595-7. As to the laws relating to banks being left to the province where the bank is domiciled to administer, save as regards duties imposed by the Banking Act on the Dominion Executive, or to be inferred from the law: see per Sir A. Campbell, as Minister of Justice, in Sarazin *v.* La Banque de Saint Hyacinthe, 20 R.L. 580, at p. 584, (1881). Provincial law and Dominion corporations

[2] 7 App. Cas. 96, 1 Cart. 265, (1881).

[3] 9 App. Cas. 157, 3 Cart. 118, (1883).

[4] 12 App. Cas. 575, 4 Cart. 7, (1887).

Prop. 55-7 notes thereto, Ministers of Justice have always strenuously objected to provincial Acts imposing the necessity upon companies incorporated under the laws of the United Kingdom or of the Dominion, of taking out a provincial license before doing business in the province; and when such Acts have contained express prohibitory provisions forbidding the doing of business without obtaining such license, they have been disallowed, the ground being distinctly taken that they are *ultra vires*, although other grounds of objection to them are also assigned. Thus in a report of March 28th, 1887,[1] Sir John Thompson says: "Although any company incorporated by the parliament of Canada must, within any province within which it is carrying on its business, be subject to all laws enacted by the provincial legislature (within its legislative authority), in the opinion of the undersigned, it is not within such legislative authority to provide that such a company shall not do business within the province without taking out a license for that purpose." And again in a report of July 16th, 1887,[2] he says: "The right

Provincial licensing of Dominion corporations

[1] Hodgins' Provincial Legislation, 2nd ed., p. 315.

[2] Hodgins' *ibid.* at p. 339. Cf. Hodgins' *ibid.* at pp. 244e, 818, 941, 1005-1010. The last citation is to the latest instance, in which the report of Mr. Dickey was made already referred to (*supra* p. 505), and in which the Manitoba Act, 58-59 Vict. c. 4, was disallowed, although it only sought to impose the necessity of taking out a provincial license upon such United Kingdom, Dominion, and foreign corporations as were 'duly authorized to carry out or effect any of the purposes or objects to which the legislative authority of the legislature of Manitoba extends.' It was contended by the Attorney-General of Manitoba, (Hodgins' *ibid.* at p. 1009), that "it is perfectly competent for the legislature to make provisions as to the conditions under which such companies shall transact business affecting property and civil rights in the province." Mr. Dickey observes, (Hodgins' *ibid.* p. 1010), "no attempt has been made to justify the Act as a measure of taxation;" but if, as is submitted, a tax by way of license for carrying on a business is direct taxation, as the Privy Council have now decided in the Brewers' and Maltsters' Association of Ontario *v.* The Attorney-General of Ontario, 13 Times L.R. 197, (1897), (and see *supra* p. 361, n. 2), it would seem unquestionable that the provincial legislatures

of a corporation, so created by the federal author- Prop. 55-7
ity, to hold lands or to make contracts in the several provinces in which it is established as a civil person, may be dependent on the general law of each province as to corporations, but cannot, in the opinion of the undersigned, be restricted by any provincial legislation aimed at corporations established by the federal parliament." And as to corporations incorporated under the laws of Great Britain and Ireland, Sir John Thompson says:[1] "A company incorporated by a statute of the United Kingdom and engaged under and within the powers conferred by such statute, in business within the province of Quebec, or elsewhere within the Empire, requires no license from the provincial authorities, and it is undoubtedly within the powers of the parliament of the United Kingdom to confer upon a company any powers and rights which it may please to convey, whether the power of holding lands and the right of making contracts, or otherwise."

Provincial licensing of Imperial and Dominion companies.

But with deference, it is submitted that the mere fact of a company being incorporated by Imperial Act, or Dominion Act, does not in itself make it the less subject to the law of the province in which it carries on business, whether in respect to the requirement of a license or otherwise. To produce such a result the Imperial Act would have to so enact, either expressly or by necessary implication;[2] and

could so tax Dominion or any other corporations: Bank of Toronto *v.* Lambe, 12 App. Cas. 575, 4 Cart. 7, (1887). Such taxation was upheld in City of Halifax *v.* Western Assurance Co., 18 N.S. 387, (1885), and City of Halifax *v.* Jones, 28 N.S. 454, (1896). And see Proposition 61.

[1] Hodgins' *ibid.* at p. 342.

[2] And so in Allen *v.* Hanson, 13 L.N. at p. 134, 16 Q.L.R. at p. 85, 4 Cart. at pp. 493-6, Dorion, C.J., says:—"It can hardly be contended that a declaration in the articles of association of a company incorporated in Great Britain under the Imperial Companies Act, that the company intend to carry on business in Canada, can have the effect of

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the powers of the Dominion corporation would have to relate to some business, such as banking, over which it has exclusive jurisdiction under one of its enumerated powers, and in relation to which it had actually legislated.[1]

Incorporation merely creates an artificial person with certain powers.

To repeat the words of the Privy Council already cited,[2] what an Act of incorporation does, "is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area," but it may nevertheless be subject in carrying on that business to the law of the locality wherein it does so. As Cameron, J., says, in *Re* Junction R.W.Co.,[3] "creating a corporation can hardly be said to be making a law;" and so the same learned judge says, in Clegg *v.* Grand Trunk R. W. Co.:[4] "I wish to be free to consider whether a corporation created by the Dominion parliament must not outside of its corporate powers and functions, be regarded as a simple entity which is, as far as the exercise of civil rights are concerned, not expressly provided for by the Act of incorporation, subject to the laws respecting such rights within the province in which it

relieving the company from the operation of Canadian laws as regards their property, and the dealings of such company in Canada. If this authority to carry on business in Canada had been conferred on the company by a special Act of the Imperial parliament, such enactment should be construed as permissive only, so as to enable the company to do business elsewhere than in Great Britain, without forfeiture of its charter, and not as overriding the laws of Canada any more than the laws of any foreign country to which its operations might extend." And see Proposition 12 and the notes thereto, especially at pp. 218-20.

[1] It is submitted that if the Dominion parliament incorporated a bank, but had passed no banking law, the bank would be subject to the general law governing property and civil rights of any province wherein it carried on business.

[2] *Supra*, p. 620.

[3] 45 U.C.R. at p. 317, (1880).

[4] 10 O.R. at p. 714, (1886).

may carry on its authorized business or exercise its corporate powers; and whether in this respect a corporation can have any greater or higher rights than a natural person." But, it is submitted, although the Dominion parliament can give a corporation it is creating any powers and functions it likes, outside 'provincial objects' within the meaning of No. 11 of section 92 of the British North America Act, it can only regulate its exercise of civil rights in respect to the classes of subjects enumerated in section 91. Prop. 55-7

Provincial companies and Dominion law.

And analogously, as to provincial corporations being subject to Dominion laws, Patterson, J., says in Schoolbred *v.* Clarke,[1] "the body politic created by any provincial Act of incorporation becomes, like a natural body, subject to the laws of the land. There are a number of subjects over which exclusive legislative jurisdiction is given to the parliament of Canada, as well as others in relation to which the parliament may make laws for the peace, order and good government of Canada, the legislation on which must govern all corporate bodies as well as natural bodies; for example, interest, legal tender, currency, taxation, the criminal law, and bankruptcy and insolvency."[2]

[1] 17 S.C.R. at p. 274, 4 Cart. at p. 464, (1890).

[2] There is an apposite passage in Story on the Constitution of the United States, (5th ed., Vol. 2, p. 153). He says: "A strange fallacy has crept into the reasoning on this subject," (sc. the power to create corporations). "It has been supposed that a corporation is some great independent thing; and that the power to create it is a great substantive, independent power; whereas, in truth, a corporation is but a legal capacity, quality, or means to an end; and the power to create it is, or may be, an implied and incidental power. A corporation is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation; but a corporation is created to administer the charity. No seminary of learning is instituted in order to be incorporated; but the corporate character is conferred to subserve the purposes of education. No city is ever built

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And so with a corporation created by Act of the old Province of Canada, in the Hamilton Powder Co. *v.* Lambe,[1] the Quebec Court of Queen's Bench decided that such a company, though incorporated with the power to manufacture and sell gunpowder, was nevertheless subject to be interfered with as to the privileges so conferred upon it and hitherto enjoyed, by provincial legislation after Confederation requiring it to take out a license as a matter of police regulation in connection with its business.

Companies of old province of Canada.

And it is upon the principle of Proposition 55, as illustrated and applied in Citizen's Insurance Co. *v.* Parsons,[2] that in Allen *v.* Hanson,[3] the Court of Queen's Bench in Quebec, held that the Act 47 Vict., c. 39, D., which enacted that the Dominion Winding-Up Act should apply to incorporated trading companies 'doing business in Canada, no matter where incorporated,' was *intra vires*, and confirmed an order granted upon the petition of the liquidator, under a liquidation previously instituted under the Imperial Act of 1862, in Scotland, and as ancillary to that principal winding up; and this decision was affirmed on appeal to the Supreme Court of Canada.[4] For as Dorion, C.J., delivering the judgment of the majority of the Court, says:[5] "It is evident

Dominion control of Imperial and foreign companies.

with the sole object of being incorporated; but it is incorporated as affording the best means of being well governed. . . In truth the power of creating a corporation is never used for its own sake; but for the purpose of effecting something else. So that there is not a shadow of reason to say, that it may not pass as an incident to powers expressly given as a mode of executing them."

[1] M.L.R. 1 Q.B. 460, (1885).

[2] 7 App. Cas. 96, 1 Cart. 265, (1881).

[3] 13 L.N. 129, 16 Q.L.R. 79, 4 Cart. 470, (1890).

[4] 18 S.C.R. 667, 4 Cart. 470, (1890).

[5] 13 L.N. at pp. 133-4, 16 Q.L.R. at pp. 84-5, 4 Cart. at pp. 493-6. A further extract from this judgment has been made, *supra* p. 625, n. 2.

that the Dominion parliament never intended to regulate, suspend or dissolve, by the Winding-Up Act, any corporation existing under British or foreign authority, but merely to regulate their property and restrain their action in this country, which it undoubtedly had a right to do. The several legislative bodies in Canada can have no concern in what a foreign corporation might do elsewhere; they are only interested in protecting the rights of creditors of such corporation upon their property within this country, and more particularly the rights of their own citizens and of resident creditors. . . . The provisions of the Winding-Up Act of Canada regulate the proceedings of our Courts to enforce the rights of creditors and of shareholders in the property of such companies. As they only relate to procedure, their operation is confined to property found within the territorial limits of the jurisdiction of the Courts authorized to enforce them. For the same reason, within such limits their operation can neither be regulated nor restrained by any foreign legislation." And so, in the Supreme Court, Ritchie, C.J., says[1]: "All the Winding-Up Act, as I understand it, seeks to do in the case of foreign corporations is to protect and regulate the property in Canada, and protect the rights of creditors of such corporations upon their property in Canada;" and Strong, J., distinguishes[2] the prior case of Merchants Bank of Halifax *v.* Gillespie,[3] which, as he says, raised the question of the validity of winding-up proceedings under the Dominion statute as the sole and principal winding up of a company incorporated under the English Act of 1862, and in which the

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Dominion Winding-Up Acts and foreign companies.

[1] 18 S.C.R. at p. 673, 4 Cart. at p. 477.

[2] 18 S.C.R. at p. 674, 4 Cart. at pp. 477-8.

[3] 10 S.C.R. 312, (1885).

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Supreme Court held that an order could not be made under that statute (45 Vict., c. 23) for the winding up of the Steel Company of Canada, a joint stock company incorporated in England in 1874, under the Imperial Joint Stock Companies' Act, and never incorporated in Canada, but with its chief place of business in Nova Scotia, where it owned and operated extensive iron mines and iron and steel works, constituting almost its whole assets, while it owned no real estate or premises elsewhere than in Canada, but occupied an office in Great Britain.

Dominion Winding-Up Acts and foreign companies

In this latter case Strong, J., held that if the Dominion Act was to be construed as intended to apply to authorize the winding-up order sought, which he held it was not, it would be *ultra vires* as in conflict with the Colonial Laws Validity Act, Imp. 28-29 Vict., c. 63, s. 2, which enacts that any colonial law repugnant to any Act of Parliament extending to the colony to which such law may relate shall be void to the extent of such repugnancy,[1] for he said the company was "subject to an express statutory provision for its winding up in the appropriate forum of its domicile, namely the Imperial Act of 1862, under which the company was organized and winding up is provided for." But he adds that he did not intend "to impugn the power of the legislature to enact bankruptcy and insolvency statutes applying to foreign corporations, or even to provide for the winding up of such corporations, provided in the case of the latter the statutory provision is express and does not conflict with any Imperial legislation."[2] He indeed speaks in

[1] See as to this statute further, *supra* pp. 209-10.

[2] Henry. J., in this case, (10 S.C.R. at p. 334), likewise says: "If the provisions of a Dominion statute, as in this case, contravene an

this passage as though he held that the Dominion Act was not intended to apply at all to companies incorporated under the Imperial Joint Stock Companies Act, as does also Ritchie, C.J., in this case; but their subsequent judgments in Allen *v.* Hanson,[1] show very clearly that what they mean is that the Dominion Act was not intended to authorise the making of an original winding-up order against such a corporation; and so in the last named case, Strong, J., says[2] that he adheres to what he said in Merchants Bank of Halifax *v.* Gillespie, "as applicable to the principal and original winding up of such a company, to which case my opinion was intended to apply and alone did apply."

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Dominion Winding-Up Acts and foreign companies.

To continue the consideration of this line of cases, in *Re* Clark and the Union Fire Insurance Co. (No. 2),[3] Boyd, C., held the Dominion Winding-Up Act, 45 Vict., c. 23, *intra vires* of the Dominion parliament, as in the nature of an insolvency law, and that it applies to all corporate bodies of the nature mentioned in it all over the Dominion, and that the company in question in that case, though incorporated under a provincial charter, was subject to its provisions;

English statute regulating an English incorporated company, such provisions would be *ultra vires*. . . It is possible that a company chartered in the United States or other foreign country doing business here might be wound up under the Dominion Act, if such could be done without interfering with the terms of the constating articles, but I see serious difficulties in the way, even in such a case." And see Lindley's Law of Companies, 5th ed., at p. 623. It may be observed that Henry, J., did not sit in Allen *v.* Hanson. It may also be observed, with special reference to the dissenting judgment of Fournier, J., in Merchants Bank of Halifax *v.* Gillespie, 10 S.C.R. 312, that in Citizens Insurance Co. *v.* Parsons, 7 App. Cas. 96, 1 Cart. 265, no such question arose of direct conflict with, or repugnancy to an Imperial Act as arose in Merchants Bank of Halifax *v.* Gillespie.

[1] 18 S.C.R. 667, 4 Cart. 470, (1890).

[2] 18 S.C.R. at p. 674, 4 Cart. at pp. 477-8.

[3] 14 O.R. 618, (1887); affirmed 16 O.A.R. 161; and also in the Supreme Court, *sub nom.* Schoolbred *v.* Clarke, 17 S.C.R. 265, 4 Cart 459, (1890). For an extract from the judgment of Patterson, J., in this case, see *supra* p. 627.

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and observes, (at p. 620): "The case in the Supreme Court of The Merchants Bank v. Gillespie,[1] does not touch the status of the present company, which is a domestic corporation within the territorial limits of Canada, whereas the company there in question was for the purpose of the Act a foreign one domiciled in England."

Dominion Act requiring a deposit from foreign companies.

And the Merchants Bank of Halifax *v.* Gillespie, was again distinguished in *Re* Briton Medical Life Association[2] where it was held by Proudfoot, J., that the Dominion Acts, 31 Vict. c. 48, D. and 34 Vict. c. 9, D., requiring foreign insurance companies doing business in Canada to make a certain deposit with the Minister of Finance, were *intra vires*, and an order was there made, on petition, for the distribution of the deposit made by the English company in question among the Canadian policy holders, notwithstanding that proceedings to wind up the company were pending before the English Courts, Proudfoot, J., observing with reference to the Merchants Bank of Halifax *v.* Gillespie, that in that case there was no question of a deposit, and what was sought was not the distribution of the deposit, but the general winding up of the company.

To return to Proposition 55, although the Dominion parliament can alone incorporate companies to carry on business throughout the Dominion, and can alone incorporate companies for objects other than provincial, a provincial corporation existing in one province, may doubtless also be incorporated with similar rights and powers in another province by the legislature of the latter. And so in Dobie *v.* The

[1] 10 S.C.R. 312. *Supra* pp. 629-31.

[2] 12 O.R. at pp. 447-8, 4 Cart. at pp. 646-7, (1886).

Temporalities Board,[1] Dorion, C. J., speaking of an Act incorporating a religious body for the purpose of acquiring property, and of managing it for the support of their ministers, and of educating young men for the ministry, says:—"When the powers imparted by such incorporation apply to one province only, the incorporation is for provincial purposes, and its franchises can only be conferred by the legislature of the province where those franchises are to be exercised, and not by the Dominion parliament. . . A religious body so incorporated in one province might, however, wish to extend its operations and seek to obtain the same corporate rights in one or more of the other provinces; and, it can hardly be contested, each local legislature would have the same power to grant to a body, already incorporated in one province, the same franchises to be exercised within the limits of its own jurisdiction, and all the local legislatures might successively do the same. These corporate rights would not cease to be civil rights, nor to have provincial objects, for having been successively granted in more than one of the provinces of the Dominion; and the Dominion parliament could not, therefore, claim to interfere and grant to a society incorporated in Quebec the same corporate rights in Ontario, under the pretence that the society being already incorporated in Quebec, its operations would extend to more than one province by the new Act of incorporation."[2]

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Provincial incorporation of a body already incorporated with similar powers in another province.

[1] Doutre on the Constitution of Canada, at p. 260, 1 Cart. at pp. 388-9, (1880).

[2] It is competent, however, for the Dominion parliament to incorporate under Dominion charter the members of a provincial company, and so enlarge the scope of their operations and powers. See Todd's Parl. Gov. in Brit. Col., 2nd ed. at p. 437. And as to railways, Mr. Todd says, (*ibid.* at p. 482), that the Dominion parliament is empowered by declaring a railway or "other corporation," (as to which see *supra* p. 604, n.), to be a work for the general advantage of

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The learned Chief-Justice goes on to intimate his opinion that the Dominion parliament could not incorporate a religious society, such as the Orange society, with franchises applying to the whole Dominion, which, he says, shows "that what are civil rights and provincial objects is not to be determined by the extent of territory, to which interested parties may wish to apply legislative action, but by the character of such rights and objects." But it is submitted that the reasoning of the Privy Council in Citizens Insurance Co. *v.* Parsons,[1] is decisive

Incorporation of religious societies.

Canada to extend its powers, and give it a right of operation in two or more provinces. And see some remarks on federal extension of provincial charters in 3 C.L.T. 242. It may also be noted that the Dominion Consolidated Insurance Act, 40 Vict. c. 42, s. 28, enacts that it shall be lawful for any company within the exclusive legislative control of any one of the provinces of Canada to avail itself of its provisions, 'and if it do so avail itself, such company shall then have the power of transacting its business of insurance throughout Canada.' See *infra* pp. 638-9. As to the incorporation by the Dominion parliament of a company already incorporated in the United Kingdom, see Todd *ibid.* at pp. 539-40. In certain cases provincial companies must resort to Parliament for necessary powers. Thus Mr. Bourinot says, (Parliamentary Procedure and Practice, 2nd ed., at p. 680): "Whenever companies incorporated under provincial Acts have required certain privileges upon navigable streams, they have always sought and obtained them from the general legislature;" and he refers to 45 Vict. c. 37, D., an Act respecting bridges over navigable waters, constructed under authority of provincial Acts. So, in a report as Minister of Justice in 1889, Sir J. Thompson expresses the view that it is beyond the powers of a provincial legislature "to authorize the erection of a bridge over a navigable stream thereby necessarily interfering with its navigation :" Hodgins' Provincial Legislation, 2nd ed., p. 379. And in a report of 1890, he says: "A provincial legislature may authorize a company to build a railway between two points in a province on a line crossing which there may be a navigable stream, but the parliament of Canada alone can legalize the erection of a bridge across such stream : Hodgins, *ibid.* p. 1118. And so in Re Brandon Bridge, 2 M.R. 14, (1884), a provincial Act authorizing the construction of a bridge over a navigable river was held *ultra vires*. Cf., also, Attorney-General of Canada *v.* Victoria, 32 C.L.J. 597, (1896). See, also, *supra* p. 563, n. 2, and *infra* pp. 639-43. In a report of May 31st, 1890, as Minister of Justice, (Hodgins' Provincial Legislation, 2nd ed., at p. 586), Sir John Thompson expresses an opinion that it is *ultra vires* of a provincial legislature to confer on a company incorporated by Dominion charter enlarged powers and franchises, and thus in effect amend the provisions of the Dominion Act of incorporation.

Dominion grant of powers to provincial companies.

[1] 7 App. Cas. at pp. 116-7, 1 Cart. at pp. 282-3. See *supra* p. 504.

that the Dominion parliament could incorporate such a society as he is referring to.[1] Prop. 55-7

In the same way the decision of Dorion, C.J., in Regina *v.* Mohr,[2] seems now unsustainable, holding as he did that the Dominion Act, 43 Vict. c. 67, incorporating the Bell Telephone Company, was *ultra vires*, because, though it authorized the company to build, construct and operate any line or lines for the transmission of messages by telephone in Canada or elsewhere, and to make connection with any line or lines of any telegraph or telephone company in Canada or elsewhere, yet it did not incorporate the company for the purpose of connecting two or more provinces by telephone lines, and consequently[3] "the company can establish independent lines of telephone in each province, not connecting the one with the other. . . To give to the Dominion parliament the power to authorize the Bell Telephone company to impede circulation and traffic in the streets of Quebec, one

Dominion incorporation of telegraph and telephone companies.

[1] Nevertheless there may no doubt be objects for which only a provincial legislature could incorporate a company because of their necessarily provincial character. Thus in Forsyth *v.* Bury, 15 S.C.R. 543, (1888), Ritchie, C.J., says, at p. 549, of the Dominion Act purporting to incorporate the Anticosti company:—"This Dominion Act, so far as it professes to confer the right to purchase the island of Anticosti, in the province of Quebec, and to sell or lease the same, is, in my opinion, clearly *ultra vires* of the Dominion parliament. It is for a provincial object, and affecting property and civil rights in the province of Quebec alone; the legislative right to incorporate such a company belongs to the provincial legislature under the British North America Act. Strong, J., (p. 551), also expresses the same opinion, while Gwynne, J., intimates an inclination to hold otherwise, but in the view these last two judges took of the case, it was unnecessary for them to determine the point, while the remaining judges, (Fournier and Taschereau, J.J.), do not pass upon it. See, also, *supra* p. 375, n. 2. As to the Quebec Act, 50 Vict. c. 28, incorporating the Society of Jesus being *intra vires*, see La Compagnie de Jesus *v.* The Mail Printing Co., 20 R.L. 30, (1890).

Objects necessarily provincial.

[2] 7 Q.L.R. 183, 2 Cart. 257, (1881). See as to this case, per Dorion, C. J., in Loranger *v.* Colonial Building and Investment Association, 3 Cart. at p. 140.

[3] 7 Q.L.R. at p. 189, 2 Cart. at pp. 265-6.

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of two conditions would be required; either the company should have been incorporated for the purpose of connecting by telephone lines the province with any other or others of the provinces of the Dominion, or of extending its line of telephone beyond the limits of the province of Quebec; or it should have been declared by the parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces."[1] And Cross, J., in that case, though he differed in his interpretation of the Act in question appears to have agreed with Dorion, C.J., in his view of the constitutional point. It is submitted, however, in view of the subsequent Privy Council decisions on which Proposition 55 is based, that the Act in question was *intra vires*, and that the company might indeed, if it chose, confine its operations to any one province, but that as to blocking the streets of Quebec, which was the matter of complaint in the case, the company would be subject in all its local operations to any municipal regulations or any other laws or regulations existing in the locality and validly made by or under the authority of the provincial legislature.[2]

Dominion incorporation of telegraph and telephone companies.

[1] As to such declarations in the case of companies other than railways, and Sir John Macdonald's expressed opinions as to the existence and expediency of the power to make them, and Mr. Blake's view that they could not be made in the case of mere trading companies, see Mr. Bourinot's Parliament Procedure and Practice, 2nd ed. at p. 672. And see *supra* p. 604, n.

[2] In the same case Dorion, C.J., says that "the Dominion parliament could not authorize the establishment of a telegraph wholly within the province of Ontario, or of any of the other provinces." But though the Dominion parliament could not indeed incorporate such a company for the sole purpose of operating within the limits of any one province exclusively, yet it, and it alone, could incorporate a company with power to operate in all or any of the provinces, and such company could then, if it chose, confine its operations to any one province, being in subjection, however, to all valid provincial laws. See Proposition 57, and *infra*, p. 644. By a report of January 28th, 1889, it may be noted, the Minister of Justice, (Sir John Thompson),

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And although by No. 11 of section 92 of the British North America Act, the provincial power to incorporate is confined to 'companies with provincial objects,'[1] a corporation, though existing only within the limits of the sovereignty which created it, may, as a general rule, act elsewhere through agents, if the laws of other countries permit.[2] And in The Colonial Building and Investment Association *v.* The Attorney-General of the Province of Quebec,[3]

Provincial companies operating outside the province.

recommended the disallowance (unless sooner repealed) of a New Brunswick Act incorporating a telephone company, on the ground that it conferred upon it certain exclusive rights interfering with and restricting the Dominion Act of incorporation of the Bell Telephone company and materially diminishing the value of the latter's franchise, though the latter had been ratified and confirmed by Act of New Brunswick: Hodgins' Provincial Legislation, 2nd ed., p. 749.

[1] In Re Grand Junction R.W. Co., 45 U.C.R. at p. 317, (1880), Cameron, J., raises the curious point, not apparently raised elsewhere, whether No. 11 of section 92 of the British North America Act "in fact gives power to create a corporation, and is not confined to the making of a general law or laws under which companies with provincial objects may be incorporated. Creating a corporation can hardly be said to be making a law, and the power given to the local legislatures in respect to corporations is to make laws in relation to the incorporation of companies with provincial objects." But the passage quoted from Story on the Constitution of the United States, *supra*, p. 627, n. 2, may be again referred to. The power of provincial legislatures to pass special Acts of incorporation seems universally conceded.

No. 11, sect. 92, B.N.A. Act.

[2] Per Harrison, C.J., in Ulrich *v.* National Insurance Co., 42 U.C.R. at p. 158, citing Bank of Augusta *v.* Earle, 13 Peters 519. In The Chaudiere Gold Mining Co. *v.* Desbarats, 15 L.C.J. at pp. 52-3, (1870), (see also S.C. in App. L.R. 5 P.C. at p. 283), Badgeley, J., says: "Corporations are creatures of limited powers, and are not and never can be citizens of the country; they are artificial creations, beings only in contemplation of law, and have no other attributes than those which the law confers upon them or suffers them to enjoy or exercise, and hence, as the law of their establishing country has no extra-territorial operation, a foreign corporation, merely as such, cannot challenge as matter of right the privilege of dealing in a country not under the sovereignty which created it. Its being a trading corporation does not alter the principle applicable to corporations in general, although the Crown or the provincial legislature may confer corporate powers locally effective even upon foreign corporations, whilst it is competent for the provincial legislature to affix upon all corporations such conditions upon their powers as may be deemed expedient and politic, although such conditions are not imposed upon citizens, and from these conditions foreign corporations can of right claim no exemption."

Companies operating abroad.

[3] 27 L.C.J. at p. 299, 3 Cart. at p. 136, (1882). On the general subject of corporations contracting and carrying on business abroad, see Howe Machine Co. *v.* Walker, 35 U.C.R. 37, (1874); and The Canadian Pacific R.W. Co. *v.* The Western Union Telegraph Co., 17 S.C.R. 151, (1889).

Prop. 55-7 Tessier, J., says that this power of establishing agencies in places outside the province belongs to a provincial corporation, "as it belongs to every individual whatsoever, provided he submits to the laws of the country in which he establishes that agency." So, also, in Clarke *v.* The Union Fire Insurance Co.,[1] where it was contended that a provincial corporation had not the status or capacity to contract outside of provincial jurisdiction which a Dominion corporation possesses, the Master in Ordinary in Ontario held that there was no warrant for this contention, and that such a corporation, in that case an insurance company, might transact its business outside the province, wherever by comity or otherwise its contracts are recognised.[2]

Provincial companies operating outside the province.

However, Ministers of Justice have always taken strong ground that companies with power to transact business beyond the limits of the province, including fire and life insurance companies,[3] or marine insurance companies with power to take risks on vessels not touching provincial ports, or on vessels going beyond the limits of the province, though the policies be granted within the limits of the province,[4]

[1] 10 O.P.R. 313, 3 Cart. 335, (1883).

[2] But see Clement's Law of the Canadian Constitution, at p. 452, where the author questions this decision, and submits that such a provincial company must be treated by the Courts of other provinces as an unincorporated association of individuals.

[3] Hodgins' Provincial Legislation, 2nd ed., at pp. 811, 1052, 1182. Also *ibid.* at p. 583, where Sir John Thompson says: "A provincial legislature cannot authorize a company to do business beyond the limits of the province; nor can it ratify an agreement made between two companies which provides for the carrying-on of business by one or the other of them in another province."

[4] Hodgins' *ibid.* at pp. 142, 253, 492-3, 635, 1162. See the contrary view expressed by Mr. Mills, M.P., in Parliament: Can. Hans. 1887, pp. 637-8. At p. 676 of his Parliamentary Procedure and Practice, 2nd ed., Mr. Bourinot says: "In the case of Dobie it was practically decided that the question of 'territoriality,' to use a convenient expression in such cases, that is, the extent within which the company was to operate, is to be one test of its constitutionality." For the Dobie case see *supra* pp. 366-8.

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or steamship companies for the purpose of running steamers on the coast of the province 'and elsewhere,'[1] are not companies 'with provincial objects,' within the meaning of No. 11 of section 92 of the British North America Act. And the writer in the Canadian Law Times in the article already referred to, on Federal Extension of Provincial Charters,[2] is of a like opinion that the meaning of this clause is "that when the object of the company is to restrict its business (whatever it may be) to a particular province, the legislature of that province may incorporate it." But if this is so it follows that for a provincial corporation to carry on its business outside the province must be *ultra vires*.

What are 'provincial objects'?

To proceed, in a report as Minister of Justice of Jan. 18th, 1889,[3] Sir J. Thompson says:—"Doubtless a provincial legislature has power to incorporate a company for any local or provincial purpose, but in order to the effectual execution of such purpose, recourse to the Dominion legislature or Dominion officers may be necessary, and upon such consent being obtained, the provincial company may legally carry on the work for which it was incorporated." And in the same report he says in reference to a Quebec Act purporting to incorporate a company for the purpose among other things of erecting and

Provincial companies may need Dominion assistance.

[1] Hodgins' *ibid.* at p. 488. As to provincial navigation companies see *infra* p. 641, n. 2.

[2] *Supra* p. 634, n. See the subject of what class of bills come within the meaning of the words 'the incorporation of companies with provincial objects' discussed by Mr. Bourinot in the light of debates and discussions in the House itself: Parliamentary Procedure and Practice, 2nd ed., p. 669, *et seq.* It may be observed that what corresponds to No. 11 of section 92 of the Act, in the Quebec Resolutions, viz. No. 43 (11), is as follows: "The incorporation of private or local companies, except such as relate to matters assigned to the general parliament."

[3] Hodgins' Provincial Legislation, 2nd ed., p. 379. And see *supra* p. 634, n.

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maintaining dams along the rapids of the River Richelieu, and to conduct water from said river by canals or flumes from such dams, for hydraulic and manufacturing purposes,—"had it appeared that the intention of the legislature in incorporating this company was merely to associate the corporators together in order that they might, by obtaining the necessary authority for the purpose, either by Dominion legislation or from the proper authorities, carry on the enterprise for which they were incorporated, there would be no constitutional objection to it, but the evident intention of the Act is otherwise. It professes to give absolute rights to the company in respect to the river, dealing with a subject wholly within the powers of the Canadian parliament. The undersigned is of opinion that the Act so far as it trenches upon the Federal jurisdiction, as herein pointed out, should be amended." Quite in accordance with this is the decision in the Queddy River Driving Boom Co. *v.* Davidson[1], in which the validity of a provincial Act purporting to incorporate a Boom company with power to obstruct by piers and booms a public tidal and navigable river came into question, and the Supreme Court, (Taschereau, J. dissenting), held the Act *ultra vires* in so far as it assumed to confer such powers, for that the legislative control of navigable waters belongs exclusively to the Dominion parliament under No. 10 of section 91 of the British North America Act, which assigns to it the power to make laws in relation to 'navigation and shipping.' The

To sanction, for example, interference with navigable waters.

Queddy River Driving Boom Co. *v.* Davidson.

[1] 10 S.C.R. 222, 3 Cart. 243, 263, (1883); followed in *In re* Provincial Fisheries, 26 S.C.R. 444, (1896). At p. 515, Strong, C. J., says: "In the case of Queddy River Boom Company *v.* Davidson, this Court determined that a provincial legislature had no authority to legalize an obstruction to navigation, for the reason that the exclusive right so to legislate was under section 91 vested in the parliament of the Dominion." And see *supra* p. 563, n. 2.

ratio decidendi, is that the objects of the company could not be said to be 'provincial objects' because, involving as they did the interference with navigation, they affected the public as well without as within the province. But Palmer, J.,[1] the judge of first instance, places the matter more clearly upon the same ground as that taken by Sir J. Thompson in the report referred to, saying:—"When a company is given the right to take away the public right of navigation, if such be a federal and not a provincial matter, I think such company is not a company having only provincial objects, and therefore not within the 11th sub-section at all." However any federal matter would presumably in a greater or less degree affect the public as well without as within the province, so that this might probably in all cases be advanced as a reason why such a matter could not be a 'provincial object,' in addition to the fact of its being federal.[2]

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If 'objects' of a company affect public outside the province, they are not 'provincial.'

[1] 3 Cart. at p. 262.

[2] See also *supra* p. 634 n. In McMillan *v.* The Southwest Boom Co., 1 P. & B. 715, 2 Cart. 542, (1878), the New Brunswick Supreme Court had held that 'navigation and shipping' in No. 10 of section 91 of the British North America Act was not intended to cover the right to authorize the erection of booms for securing lumber in the rivers of the provinces, but "was used in the sense in which it is used in the several Acts of parliament of Great Britain relating to 'navigation and shipping,' and in the Act of the parliament of Canada, 30 Vict c. 58, namely, the right to prescribe rules and regulations for vessels navigating the waters of the Dominion." And see *supra* pp. 562-3. In McCaffrey *v.* Hall, 35 L.C.J. 38, (1891), the Quebec Superior Court held *intra vires* the local Act, 36 Vict. c. 81, whereby certain persons were authorized to erect piers and booms in the River Nicolet, 'provided always that the said piers and booms shall be so constructed and placed, as in no way to interfere with or obstruct the crossings, or free intercourse and navigation of said river.' And notwithstanding the Dominion power over 'navigation and shipping,' in Macdougall *v.* The Union Navigation Co., 21 L.C.J. 63, 2 Cart. 228, (1877), the Quebec Court of Queen's Bench held *intra vires* a Quebec Act incorporating a navigation company, the operations of which were limited to the province, for 'carrying on any forwarding business, and the constructing, owning, chartering or leasing ships, steamboats, wharves, roads or other property required for the purpose of such forwarding business,' as a local work or undertaking, under No. 10, of section 92. A writer in the *Canadian Law Times*, Vol. II., at p. 238, observes

'Navigation and shipping' in No. 10 of sect. 91, B.N.A. Act.

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In his dissenting judgment in this case, Taschereau, J., doubts whether the erecting of the booms under the Act in question was not a 'local work

Provincial navigation companies.

in connection with this case: "It follows that the incorporation of a provincial navigation company is not an interference with navigation and shipping. The constitution of the company is all that is dealt with. The building and working of the ships; their obligations to observe the laws of navigation with respect to each other; their liability for wrongs, and so on, would naturally fall within the jurisdiction of the Dominion." See, also, as to provincial navigation companies: Union Navigation Co. *v.* Couillard, 7 R.L. 215, (1875), and *Re* Lake Winnipeg Transportation Lumber and Trading Co., 7 M.R. at p 259, (1891), noted *supra* at p. 563. In Longueil Navigation Co. *v.* City of Montreal, M.L.R. 3 Q.B. 172, 15 S.C.R. 566, 4 Cart. 370, 388, the Quebec Act, 39 Vict. c. 52, whereby the City of Montreal was authorized to impose an annual tax on steamboat ferries was adjudged *intra vires*, notwithstanding the Dominion power over 'navigation and shipping.' It was presumably by reason of the Dominion power over 'navigation and shipping,' that by his report in 1871, as Minister of Justice, Sir J. Macdonald recommended the disallowance of a Nova Scotia Act to regulate pilotage in the Bras d'Or Lake, on the ground that a provincial legislature has no power to regulate the fees of pilots: Hodgins' Provincial Legislation, 2nd ed., at p. 476. A Dominion Act passed in 1878 to repeal 'as respects all ships while in the waters of Canada,' a section of the Imperial Merchant Shipping Act of 1876 relating to deck cargoes was disallowed by the Imperial government as claiming to legislate not merely for Canadian shipping, but for 'all ships' while in Canadian waters, "a provision," says Mr. Todd, "obviously in excess of the powers of the Canadian parliament:" Parl. Gov. in Brit. Col., 2nd ed., at p. 184. But it appears from a letter from the Board of Trade to the Colonial office dated July 13th, 1878, a copy of which is on file in the Governor-General's office at Ottawa, but which is not referred to by Mr. Todd, that apart from questions of convenience, the ground of objection to the Canadian enactment on the strict point of power was as follows: "This Colonial Act professes to repeal a section of the Imperial Act as regards all ships in Canadian waters, and the Board presume that it is passed in pursuance of section 547 of the Imperial Merchant Shipping Act. That section, however, only applies to ships registered in Canada, and the repeal therefore seems to be *ultra vires*." The reference here is to Imp. 17-18 Vict. c. 104, s. 547. It may be added that this letter of the Board of Trade also states that "whilst measurement of tonnage is an Imperial matter, local taxation of shipping is essentially a colonial matter." And as to the validity of the the Dominion Act respecting the navigation of Canadian waters, 31 Vict. c. 58, and the applicability of its provisions to collisions occurring in those waters, see Eliza Keith, 3 Q.L.R. 143, (1877); The Hibernian, L.R. 4 P.C. 511, at pp. 516-7. And see *supra* p. 212. And as to the extension of the powers of the Canadian parliament and the legislatures of the other self-governing colonies conferred by the Imperial Act of 1869, amending the law concerning the coasting trade and colonial merchant shipping, see Todd *ibid.* at p. 226. See, also, *ibid.* at p. 229. And as to the establishment of Vice-admiralty Courts, *ibid.* at pp. 230-240; also, *supra* pp. 515-17. In 1887, Sir J. Thomp-

'Navigation and shipping.'

Dominion jurisdiction over ships in Canadian waters.

or undertaking' within the meaning of No. 10 of section 92 of the British North America Act, and so the Act in question *intra vires* notwithstanding that the booms might interfere with navigation and shipping. But this seems to overlook what may be termed the predominance of the Dominion powers, as to which see *supra* p. 427, *et seq.*, and Proposition 43 and the notes thereto. Prop. 55-7

Passing to Proposition 56, it is based upon the judgment of the Privy Council in The Colonial Building and Investment Association *v.* The Attorney-General of Quebec.[1] The question before their lordships in that case was in part the validity of the Dominion Act incorporating the said association. At the place cited they say :—" Chief Justice Dorion appears to be of opinion that inasmuch as the legislature of the province had passed Acts relating to such societies, and defined and limited their operations, the Dominion parliament was incompetent to incorporate the present association, having for one of its objects the erection of buildings throughout the Dominion. Their lordships at present fail to see how the existence of these provincial Acts, if competently passed for local objects, can interfere with the power of Prop. 56. Provincial legislation cannot deprive Dominion of power to incorporate.

son, as Minister of Justice, recommended the disallowance of a Nova Scotia Act concerning collection of freight and wharfage and warehouse charges, as *ultra vires* as infringing the exclusive jurisdiction of the Dominion over navigation and shipping, and trade and commerce : Hodgins' Provincial Legislation, 2nd ed., p. 558. In 1888, he says in another report : " The undersigned is of opinion that a provincial legislature cannot give to a town council power to make regulations for the discharging and depositing of ballast, rubbish, or refuse in harbours or rivers " : Hodgins' *ibid.* p. 573 ; and in 1889, in another report, he says of a New Brunswick Act giving a town council " power to regulate the anchorage, lading and unlading of vessels and other craft arriving at the said town," that this is " clearly beyond the competency of a provincial legislature, having undoubted reference to navigation and shipping, and the management and control of harbours, those being subjects exclusively assigned to the Dominion parliament :" Hodgins *ibid.* p. 751.

[1] 9 App. Cas. at p. 167, 3 Cart. at p. 130, (1883).

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the Dominion parliament to incorporate the Association in question." They, however, add: "If the association by its operations has really infringed the Building Societies Acts, a proper remedy may doubtless be found adapted to such a violation of the provincial law. . . . If the company is really holding property in Quebec without having complied with the law of that province, or is otherwise violating the provincial law, there may be found proceedings applicable to such violations, though it is not for their lordships to anticipate them or to indicate their form."

But the Dominion corporation may be subject to the provincial law.

Prop. 57.

Proposition 57 is clearly laid down by the Privy Council in the same case. The Colonial Building and Investment Association had been incorporated with power to carry on its business, consisting of various kinds, throughout the Dominion. It was, however, contended that inasmuch as the Association had confined its operations to the province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the provincial legislature. Their lordships overruled this contention laying down the above Proposition, and adding:[1] "The parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation, nor warrant the judgment prayed for, viz., that the company be declared illegally constituted." They, however, add: "It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object."[2]

Dominion companies may confine their operations to one province.

[1] See *supra* at p. 374, *et seq.*

[2] 9 App. at p. 165, 3 Cart. at p. 128, (1883).

PROPOSITION 58.

58. In determining the validity of a Provincial Act, the first question to be decided is, whether the Act impeached falls within any of the classes of subjects enumerated in section 92 of the British North America Act, and assigned exclusively to the Legislatures of the Provinces; for, if it does not, it can be of no validity, and no further question would then arise. It is only when an Act of the Provincial Legislature *primâ facie* falls within one of these classes of subjects that the further question arises, namely, whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, [and so does not belong to the Dominion Parliament].

Citizens Ins. Co. *v.* Parsons.

The above Proposition is in the words of the Privy Council in Citizens Insurance Co. *v.* Parsons,[1] excepting that the concluding words there are "and whether the power of the provincial legislature is or is not thereby overborne," as to which see *supra* p. 498; and Proposition 43 and the notes thereto should be read in connection with it. Their lord-

[1] 7 App. Cas. at p. 109, 1 Cart. at p. 273, (1881).

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ships repeat and apply the rule in substantially the same words in Dobie *v.* The Temporalities Board[1]; while they again apply it in Bank of Toronto *v.* Lambe.[2] There the question before the Board was, whether a certain Act of the Quebec legislature, passed in 1882, entitled 'An Act to impose certain direct taxes on certain commercial corporations,' was valid. Their lordships say: "To ascertain whether or not the tax is lawfully imposed, it will be best to follow the method of enquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of section 92 of the Federation Act, namely, 'direct taxation within the province in order to the raising of a revenue for provincial purposes'? Secondly, if it does, are we compelled by anything in section 91 or in the other parts of the Act so to cut down the full meaning of the words of section 92, that they shall not cover this tax." It must be remembered, however, that the exercise of provincial legislative powers, and the operation of provincial Acts, may be sometimes more or less restricted by reason of existing Dominion legislation, as to which see Propositions 37 and 62 and the notes thereto; also *supra* pp. 357-8.

Rule for testing provincial Acts applied.

[1] 7 App. Cas. at p. 149, 1 Cart. at pp. 367-8, (1882).

[2] 12 App. Cas. 575 at p. 581, 4 Cart. 7 at p. 14, (1887).

PROPOSITION 59.

59. Any matter coming within any of the classes of subjects enumerated in section 91 of the British North America Act shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces.

Final clause of sect. 91, B.N.A. Act.

The above Proposition is in the words of the concluding clause of section 91 of the British North America Act,[1] and, after much discussion in various cases, its force and meaning have been determined by the Privy Council in the following passage of their judgment in the Liquor Prohibition Appeal, 1895[2]:—"It was apparently contemplated by the framers of the Imperial Act of 1867, that the due exercise of the enumerated powers conferred upon the parliament of Canada by section 91 might, occasionally and incidentally, involve legislation upon matters which are *primâ facie* committed exclusively to the provincial legislatures by section 92. In order to provide against that contingency, the con-

[1] It appears from Pope's Confederation Documents, (Toronto, 1895), that in the final draft of the Bill this clause had, in place of 'within the class of matters of a local or private nature comprised, etc.,' the words 'within the subject of property and civil rights comprised, etc.' And this draft further had in place of No. 16 of section 92 of the Act,—'such other classes of subjects (if any) as are from time to time added to the enumeration in this section by any Act of the Parliament of Canada,' (pp. 234-6).

[2] [1896] A.C. at pp. 359-60.

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cluding part of section 91 enacts that 'Any matter, etc. . .' It was observed by this Board in Citizens Insurance Co. *v.* Parsons[1] that the paragraph just quoted 'applies in its grammatical construction only to No. 16 of section 92.' The observation was not material to the question arising in that case, and does not appear to their lordships to be strictly accurate. It appears to them that the language of the exception in section 91 was meant to include, and correctly describes, all the matters enumerated in the sixteen heads of section 92, as being, from a provincial point of view, of a local or private nature.[2] It also appears to their lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in Citizens Insurance Co. *v.* Parsons,[3] and in Cushing *v.* Dupuy[4]; and it has been recognized by this Board in Tennant *v.* The Union Bank of Canada,[5] and in Attorney-General

The Liquor Prohibition Appeal, 1895.

Final clause of sect. 91 B.N.A. Act.

[1] 7 App. Cas. at pp. 108-9, 1 Cart. at pp. 272-3, (1881).

[2] In the argument in Hodge *v.* The Queen, in 1883, Sir Arthur Hobhouse, one of the Board, had observed that such a view of the Act as would hold the clause in question to refer to all the classes in section 92, and not only to No. 16, "would support the Dominion in almost anything," and had favoured the view that the words refer only to class 16: Dom. Sess. Pap., 1884, Vol. 17, No. 30, at p. 29.

[3] 7 App. Cas. at pp. 108-9, 1 Cart. at pp. 272-3.

[4] 5 App. Cas. at p. 415, 1 Cart. at p. 258, (1880). See *supra* pp. 426-7.

[5] [1894] A.C. at p. 46. See *supra* pp. 427-9.

of Ontario *v.* Attorney-General of the Dominion.[1] Prop. 59 . . To those matters which are not specified among the enumerated subjects of legislation, the exception from section 92, which is enacted by the concluding words of section 91, has no application; and, in legislating with regard to such matters, the Dominion parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92."[2]

Subjects of legislation not enumerated.

[1][1894] A.C. at p. 200. See *supra* pp. 429-30. The first of the above four judgments stated the view here taken by their lordships of the meaning of the clause in question, rather than illustrated it, speaking of it as "this endeavour to give pre-eminence to the Dominion parliament in cases of a conflict of powers." See *supra* pp. 410-11. The next two cases illustrate the pre-eminence of the Dominion parliament when legislating under its enumerated powers, and the last affirms it, but none of these three rest it upon or refer to the clause in question: see *supra* p. 430, n. 4. And see, also, *supra* pp. 432-3.

[2]In the Manitoba School case, Brophy *v.* The Attorney-General of Manitoba, [1895] A.C. at p. 222, the Privy Council say:—"In relation to the subjects specified in section 92 of the British North America Act, and not falling within those set forth in section 91, the exclusive power of the provincial legislature may be said to be absolute." In the argument before the Privy Council in the recent case of Fielding *v.* Thomas, [1896] A.C. 600, Lord Watson says of the concluding clause of section 91 of the British North America Act now under discussion:—"I think that clause plainly shows the consciousness of those who framed that Act, that the things given to the one parliament by section 92 and the supreme parliament by section 91, did run into each other or over-ride each other, and they got rid of the difficulty by the declaration that nothing done by the supreme legislature under the express and exclusive power given them by section 91 should be deemed to be within the exclusive power given to the province by section 92. In other words, if the Dominion exercises their power, that matter is no longer within the exclusive power committed to the province. It is a very wise provision and shows a good deal of foresight:" Manuscript transcript from the shorthand notes of Cock and Kight, at pp. 53-4. As already stated, the meaning of the clause had been considered by many judges in different cases, and several had put upon it the interpretation now established by the Privy Council. The following references to such prior dicta may possibly be of use: per Ritchie, C. J., in The Queen *v.* Chandler, 1 Hann. at p. 556, 2 Cart. at p. 426, (1869); per Fisher, J., in Robertson *v.* Steadman, 3 Pugs. at p. 637, (1876); per Allen, C.J., S.C., *ibid.* at p. 631; per Dunkin, J., in Cooey *v.* The Municipality of the County of Brome, 21 L.C.J. at p. 185, 2 Cart. at p. 386, (1877); per Fisher, J., in Steadman *v.* Robertson, 2 P. & B. at pp. 593-4, (1879); per Gwynne, J., in Citizens Insurance Co. *v.* Parsons, 4 S.C.R. at pp. 330-1, 1 Cart. at p. 336, (1880); per Ritchie, C.J., in City of Fredericton *v.* The Queen, 3 S.C.R. at pp. 537, 540, 2 Cart. at pp. 35, 38-9, (1880); per

Lord Watson.

Judicial dicta on final clause of sect. 91, B.N.A. Act.

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Now, although in the above passage the Privy Council say that the concluding clause of section 91 was not meant to derogate from the legislative authority of the provincial legislatures save to the extent of enabling the Dominion parliament to fully exercise its enumerated powers, it would not seem that they intend this as a pronouncement in any way against that interpretation of it, which would also find in it the further significance that the provincial legislatures cannot legislate on any of the enumerated matters in section 91 for their own provinces, under the pretence or contention that the legislation is of a provincial or local character. We have seen that this is the force attributed to the clause by Strong, C.J., in Quirt *v.* The Queen.[1] Indeed passages in the course of the argument on this very Liquor Prohibition Appeal, 1895, have been already noted[2] wherein Lords Herschell and Davey attribute this meaning to the clause, and Lord Watson says:—"No pretext could be made by the provincial legislature that it could legislate on the subject of bankruptcy."[3] And, therefore, although the occasion has not arisen as yet[4] for their lordships definitely to pronounce

Further significance of final clause of sect. 91, B.N.A. Act.

Gwynne, J.,S.C., 3 S.C.R: at pp. 565-6, 570-1, 2 Cart. at pp. 57-8, 61; per Duff, J., in *Ex p.* Owen, 4 P. & B. at p. 498, (1881); per Gwynne, J., in The Queen *v.* Robertson, 6 S.C.R. at p. 64, 2 Cart. at p. 119, (1882); per Ritchie, C.J.,S C., 6 S.C.R. at p. 112, 2 Cart. at p. 83; per Ritchie, C.J., in the The Queddy Driving Boom Co. *v.* Davidson, 10 S.C.R. at p. 233, 3 Cart. at p. 255, (1883); per Palmer, J., S.C., 3 Cart. at p. 262; per Henry, J., in Sulte *v.* The Corporation of Three Rivers, 11 S.C.R. at p. 36, 4 Cart. at p. 315, (1885); per Ramsay, J., in North British and Mercantile Ins. Co. *v.* Lambe, M.L.R. 1 Q.B., at p. 189, 4 Cart. at p. 80, (1885); per Gwynne, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 212-3, (1895).

[1] 19 S.C.R. at p. 516. See *supra* pp. 573-4.

[2] *Supra* p. 574, n. 1. See, also, at p. 204 of the printed report of the argument.

[3] See *supra* pp. 385-6; also p. 573, n. 4.

[4] It may arise in the appeal before the Privy Council in the Fisheries case (26 S.C.R. 444) pending as this portion of the present work goes to press.

against the right of a provincial legislature to legislate on any of the subjects enumerated in section 91, though only locally for the province, there can be little doubt that such will be their decision, and that they will find that the concluding clause of section 91 prohibits such legislation. Indeed did that clause not contain that force and meaning, as well as that which their lordships call attention to in the passage just quoted from the judgment on the Liquor Prohibition Appeal, 1895, it would appear open to the charge brought against it by Dunkin, J., in Cooey *v.* The Municipality of the County of Brome,[1] of having been added unnecessarily, on account of the *non obstante* clause contained in the earlier part of the section, upon which we have already commented.[2] But without the concluding clause it might have been supposed that although section 91 says that Parliament may exclusively legislate upon the matters therein enumerated, this only means that it alone may legislate upon these subjects for the whole Dominion,[3] but does not prevent the provinces legislating upon them within the limits of each province.

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Further significance of final clause of sect. 91, B.N.A. Act.

And although it has thus been finally decided that the clause of section 91 which we are considering, has reference not only to No. 16 of section 92, but to all the matters enumerated in the latter section, this seems, nevertheless, a convenient place for discussing the purport of No. 16, which assigns to the provincial

[1] 21 L.C.J. at p. 185, 2 Cart. at p. 386, (1877). Mr. Edward Blake indeed says, *arguendo*, on the Liquor Prohibition Appeal, 1895:— "My submission is that . . no more is accomplished in effect by the end of section 91 than to make surer the provision which was in the beginning of it with reference to the effect of the enumeration, and I say that it leaves the general language of section 91 just where it was:" Printed report, p. 245.

[2] *Supra* pp. 427-9.

[3] But as to this see Proposition 51 and the notes thereto.

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legislatures the exclusive power of making laws in relation to 'generally all matters of a merely local or private nature in the province.' In their recent judgment in the Liquor Prohibition Appeal. 1895,[1] the Privy Council say:—"In section 92, No. 16 appears to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in section 91. It assigns to the provincial legislature all matters in a provincial sense local or private, which have been omitted from the preceding enumeration,[2] and, although its terms are wide enough to cover, they were obviously not meant to include provincial legislation in relation to subjects already enumerated." And although in an immediately preceding passage in the same judgment it is said:—"It is not impossible that the vice of intemperance may prevail in particular localities within a province, to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling *primâ facie* within No. 16," it must not be supposed that their lordships mean by this that a law may not operate over a whole province, and yet come within No. 16 of section 92. On the contrary it appears from the passage just quoted that they regarded No. 16 as referring to matters local or private in the same provincial sense as that of the preceding enumerated classes. And when upon, the argument, counsel for the Dominion contended that a local matter in No. 16 meant a matter which does not affect the province generally,—does not affect the entire province, but

No. 16 of sect. 92, B.N.A. Act.

Interpreted by the Privy Council on Liquor Prohibition Appeal, 1895.

[1] [1896] A.C. at p. 365.

[2] Cf. *supra* p. 343.

that it might perhaps be fair to construe the words as having regard to local or private bills,[1] Lord Davey observed :—" The words are 'generally all matters,' which looks as if things not previously enumerated were considered as being within it."[2] Prop. 59

Indeed the previous decision of the Privy Council in Hodge *v.* The Queen[3] might probably be considered decisive on the point. There the Act under discussion was the Ontario Liquor License Act of 1877, which, by sections 4 and 5, empowered license commissioners to make regulations as to the conditions and qualifications requisite to obtain tavern licenses for the retail of spirituous liquors within the municipalities of Ontario, and in their judgment the Privy Council say :[4]—" That Act is so far confined in its operation to municipalities in the province of Ontario, and is entirely local in its character and operation. . . Their lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations[5] of a merely local character for the good government of taverns licensed for the sale of liquors by retail. . . The subjects of legislation in the Hodge *v.* The Queen. Regulations of license commissioners.

[1] So in the argument before the Board in Hodge *v.* The Queen counsel had contended that Acts of a local or private nature in No. 16 of section 92 mean "Acts passed in the ordinary course of private Bill legislation in England, Acts affecting particular localities, and particular matters in those localities, and clearly not matters such as those of liquor licensing or matters of the kind:" Dom. Sess. Pap. 1884, Vol. 17, No. 30, at p. 64. See, also, *ibid.* at p. 61 ; and Queen *v.* Robertson, 3 M.R. at p. 620, (1886).

[2] Printed report, at p. 170. And so Lord Herschell says : —"Local does not mean local in a spot in a province, but local in the sense of confined within the boundaries of the province," and Lord Watson : "the locality of each province is the area of which it consists:" *ibid.* at p. 312. Cf. *ibid.* at pp. 152, 171.

[3] App. Cas. 117, 3 Cart. 144, (1883).

[4] 9 App. Cas. at pp. 130-1, 3 Cart. at pp. 160-1.

[5] As to the term 'police regulations' see *supra* p. 536, n. 2.

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Ontario Act of 1877, sections 4 and 5, seem to come within the heads of Nos. 8, 15, and 16 of section 92 of the British North America Act.[1] Thus it is clearly indicated that if an Act is confined in the sphere of its operation to the limits of the province, it is a 'local' Act within the meaning of the words of No. 16 of section 92, though, of course, whether it is *intra vires* or not must depend upon whether, notwithstanding this, the subject of the Act does or does not fall within one of the enumerated clauses in section 91.[2]

No. 16, sect. 92, B.N.A. Act.

Provincial game laws.

In The Queen *v.* Robertson,[3] the matter is discussed at length by the Court of Queen's Bench in Manitoba, which there held *intra vires* under No. 16 of section 92, a provincial statute regulating the killing and possession of game at certain seasons of the year.[4] Killam, J., delivering the judgment, refers to certain dicta of Ritchie, C. J., and Gwynne, J., and to the decision of the Privy Council in Hodge *v.* The Queen, and says[5] that they "serve to show that a law is considered to be 'local' within the meaning of section 92 of the British North America Act, although having operation throughout the whole of a province, and although the subject with which it deals

[1] See *supra* pp. 397-8.

[2] See Propositions 32, 33, 43, 58 and the notes thereto. And cf. per Wilson, J., in Regina *v.* Taylor, 36 U.C.R. at pp. 215-6.

[3] 3 M. R. 613, (1886).

[4] But in a report as Minister of Justice of March 21st, 1891, Sir John Thompson expresses doubt as to whether such an Act by the legislature of Manitoba is *intra vires*, where "all the lands were the property of Canada, and the ungranted lands are still the property of Canada"; and he especially questions the validity of a provision that no one not domiciled in the province should take or kill any of the animals mentioned in the Act without license from the provincial Minister of Agriculture: Hodgins' Provincial Legislation, 2nd ed. at pp. 929-30.

[5] 3 M.R. at pp. 621-2.

may be an important subject in other provinces also.[1] . . The whole scheme of the Confederation Act evidently is to give to the local legislatures control over matters purely provincial as distinguished from those of importance to the Dominion generally. A matter is 'local' therefore, if of concern to one province apart from the Dominion as a whole."[2]

Meaning of 'merely of a local or private nature in the province.'

It remains, however, to consider what is meant by 'merely' of a local or private nature in the province. It would seem to mean 'of merely local or private interest.' In the course of the argument in Russell *v.* The Queen, (see p. 398, n. 1), Sir Montague Smith said, (2nd day, p. 115): — "The test as to whether it is merely local, is whether the rest of the Dominion of Canada is interested in it."[3] And on the argument in the matter of the Dominion Liquor License Acts, 1883-4. Sir Farrer Herschell, as he then was, contended as follows:—"The fact that an Act operates locally, or that its benefits are felt locally all through the Dominion, does not show it to be a merely local matter, because the words are not 'of a local nature,' but 'of a merely local nature,' which I take to

[1] The learned judge explains what he means here in a later part of his judgment, (p. 622), where he says:—"The Ontario Act relating to the nature of a contract of fire insurance was considered in The Citizens Insurance Co. *v.* Parsons, 7 App. Cas. 96, to be one upon a matter of a 'local' or 'private' nature, and yet the same circumstances would be found to exist in each of the other provinces, and might be considered to call for the same remedy; but the matter was local because the legislation upon it did not affect the other provinces except in a most indirect way." The Privy Council place the Act in question in Citizens Insurance Co *v.* Parsons under No. 13 of section 92, 'property and civil rights in the province'; Killam, J.'s, reference was doubtless to the words of Ritchie, C. J., S.C. 4 S.C.R. at p. 248, which he cites in an earlier part of his judgment, (pp. 620-1).

[2] And cf. per Sanborn, J., in *Ex parte* Dansereau, 19 L.C.J., at p. 237, 2 Cart. at p. 199, (1875).

[3] See also in the notes to Proposition 51, *supra* pp. 578-81.

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be something in which the province, and the people in that province and they alone, have an interest,—something that is not likely to concern or affect the people outside the province[1];" while on the argument on the recent Liquor Prohibition Appeal, 1895, in like manner, when Lord Herschell and a member of the Board, he gave as an equivalent to 'merely of a local nature,'—"not touching by its immediate and direct operations those outside the province."[2] And on the same argument, Lord Watson said:—"A distillery is a mere local matter, but the moment you tax all its productions, for the purpose of filling the Exchequer," (*sc.* the Dominion Exchequer), "it may be a question whether it does not then cease to to be a matter of local interest merely."[3] And again on this argument, in reference to the question submitted to the Court as to the jurisdiction of a provincial legislature to prohibit the importation of intoxicating liquors, Lord Herschell said:—"That cannot be treated as a merely local matter because, inasmuch as it directly affects the revenue of the Dominion, it cannot be a local matter to the province. . . Can you treat the importation and the conditions of importation in a province as merely a local matter? . . But manufacture in a province may be said to be a local matter. Take the case of a dangerous manufacture, supposing the province said, 'we will not have dynamite made in our province, because it is dangerous to the neighbourhood?'" Whereupon Lord Halsbury, L.C., observed:—"Supposing that was the only source of supply in the Dominion, which was necessary for

Meaning of 'merely of a local or private nature in the province.'

[1] Printed transcript from Marten & Meredith's shorthand notes, at p. 151.

[2] Printed report at p. 152. See p. 398, n. 1.

[3] *Ibid.* at p. 154. However, see as to prohibiting sale of liquor, pp. 399-402, exp. note on p. 402.

mining purposes elsewhere? I should think that was a serious question."[1] And in the result, as to the question respecting prohibiting importation, their lordships,—though guardedly saying that their answers to the academic questions submitted, were not meant to have, and could not have, the weight of a judicial determination,—replied that it appeared to them "that the exercise by the provincial legislature of such jurisdiction, in the wide and general terms in which it," (*sc.* the question), "is expressed, would probably trench upon the exclusive authority of the Dominion parliament[2];" while in answer to the question submitted as to provincial power to prohibit the manufacture of such liquors within the province, they said:—"In the absence of conflicting legislation by the parliament of Canada, their lordships are of opinion that the provincial legislatures would have jurisdiction to that effect, if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province."[3]

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Prohibiting importation of intoxicating liquors.

Prohibiting manufacture of intoxicating liquors.

[1] *Ibid.* at pp. 126-7.

[2] [1896] A.C. at p. 371. In the course of the argument Lord Watson said:—"A municipal prohibition to take effect within the limits of a municipality may be a local subject within the meaning of sub-section 16," (*sc.* of section 92 of the British North America Act), "when a general prohibition of all imports would not be local. . . Would that be a provincial matter, the stoppage of spirits not intended to stop in the province and not intended to be consumed there? At present it does not appear to me it would be a provincial matter": Printed report, at p. 181.

[3] [1896] A.C. at p. 371. And as to the significance of the word 'merely' see, further, *supra* pp. 384-5. See, also, per Robinson, C.J., in Gordon *v.* Fuller, 6 O.S. at p. 182, (1836), who held that the power given by Imp. 31 Geo. III., c. 31, to 'make laws for the peace, welfare, and good government' of Upper Canada, was to be construed as a power "to make laws to operate directly only on the peace, welfare, and good government of this province though indirectly they may affect—which is inevitable,—persons resident out of it;" and that it

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It must no doubt be difficult in many cases, especially when the enactment extends to the whole province, to say what is and what is not a matter of a merely local or private nature in the province. For as Lord Herschell said on the argument just referred to[1]:—"Everything that is for the benefit of a part is in its degree and sense for the benefit of the whole;" and "there is scarcely anything which it may be desirable and beneficial for a province to deal with locally that might not become at some time or other a matter of Dominion concern, and therefore one on which it might be necessary for the Dominion to legislate for the whole Dominion. That deprives the provincial legislature of all legislative power."[2] On the other hand, as Mr. Edward Blake observed, in the course of the same argument[3]:—"One can suggest extreme cases in which it would be perfectly clear. For instance with reference to a small ordinary travelled road in one portion of a great province, you might say in one sense that the prosperity of the whole Dominion depends on the prosperity of each of the inhabitants: there are twenty people that live on this road, the whole Dominion will be infinitesimally better off, but still better off if these twenty are better accommodated, and therefore it is a Canadian matter to see to the repair of that road or legislate with regard to it. I should say that that proposition would be obviously absurd, and that that

No. 16, sect. 92, B.N.A. Act.

'Merely of a local or private nature in the province.'

did not reasonably extend to the repeal of an Act of the British parliament expressly passed to afford facilities to British subjects resident in England, such as Imp. 5 Geo. II., c. 7, s. 1, respecting affidavits to be made in England for proofs of debts sued for in this province, then under consideration.

[1] At p. 230.

[2] At p. 248. And see the judgment, [1896] A.C. at p. 361, and *supra* pp. 360, n. 1, 383-5, 408-10, 507-8, and Proposition 47 and the notes thereto.

[3] At p. 233.

matter would be obviously a merely local or private matter. There must be some reasonable suggestion to sustain the proposition that there is a common interest in the condition of the question and of the treatment of it by the parliament concerned." Whereupon Lord Davey said :—"If there were larger elements of disorder and rebellion against government in one particular province, it would be a matter of the peace, order, and good government to prohibit the sale of fire arms in that province." To which Mr. Blake rejoined :—"Yes, and it would be, as I submit, within the power of the parliament of Canada." But, as we have seen,[1] the Privy Council clearly uphold the view that a law may extend to a whole province and yet relate to a matter of a merely local nature in the province within the meaning of No. 16 of section 92. And so the preservation of the public health within the province, excepting, of course as regards 'quarantine and the establishment and maintenance of Marine Hospitals,' by No. 11 of section 91 assigned to the Dominion parliament,[2] has been held in Ringfret *v.* Pope,[3] to be a matter of a merely local or private nature in the province, Cross, J., dissenting so far at all events as concerns the establishment of a central Board of Health, with a system of subordinate Boards, as in C.S.C., c. 38.[4] He observes, at p. 313 :—"Although the provincial legislature might make and enforce police regulations directly, or by giving that power to be executed by the municipalities so as to promote health within their several jurisdictions, or deal with the subject in a sense that was purely local, the Dominion legis-

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A matter may extend to the whole province and yet be 'local,'

e.g., sanitary legislation.

[1] *Supra*, at pp. 652-4.

[2] As to which see, also, *supra* p. 560, note.

[3] 12 Q.L.R. at p. 303.

[4] For some unexplained reason he considers this not matter 'of a merely local or private nature' (p. 313).

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lature could deal with it in a general sense, and take appropriate measures to prevent or mitigate an epidemic, endemic or contagious disease, with which the Dominion, or any part of it, was threatened." And in La Municipalité du Village St. Louis du Mile End *v.* La Cité de Montreal,[1] the Superior Court at Montreal held in the words of Mousseau, J.[2]:— "La santé est de juridiction municipale, de juridiction locale ou provinciale."[3]

Ferries and rights of ferriage.

Again a ferry between two points in a province and the right of ferriage has been held to be a matter of a local or private nature.[4] And the judgment of Wurtele, J., in Tarte *v.* Béique[5] may be cited in support of the view that matters of a 'merely local or private nature in the province' referred to in No. 16 of section 92[6] cover a law commanding all

[1] M.L.R. 2 S.C. 218, (1885).

[2] At p. 225.

[3] And so Bolland *v.* Dugas, 15 R.L. 266, (1885); and Dooley *v.* La Cour du Recorder, R.J.Q. 6 S.C. 126, (1894). And see per Cross, J., in Pillow *v.* City of Montreal, M.L.R. 1 Q.B. at p. 409. In 1869 a bill providing for vaccination was not proceeded with in the Dominion parliament, as it was considered doubtful if it was within its jurisdiction: Bourinot's Parliamentary Procedure and Practice, 2nd ed., p. 674, citing Com. Deb. 1869, p. 64; Sen. Deb. 1879, p. 47.

[4] See Longueil Navigation Co. *v.* City of Montreal, M.L.R. 3 Q.B. at p. 190, 15 S.C.R. at p. 574, 4 Cart. at pp. 377, 388, (1888); and Dinner *v.* Humberstone, 26 S.C.R. at pp. 266-7, (1896).

[5] M.L.R. 6 S.C. 289, 296, (1890). For S.C. in appeal see *sub nom.* Turcotte *v.* Whelan, M.L.R. 7 Q.B. 263, (1891), over-ruling the decision of Wurtele, J., but not on this point. And see *supra* p. 387.

[6] In the argument in Russell *v.* The Queen, (see *supra* p. 398, n. 1), considerable discussion arose among members of the Board whether No. 15 of section 92 of the British North America Act, applies to the subsequent No. 16, not only because of its position, but on the ground suggested by Sir Barnes Peacock, that No. 16 is not one of the 'subjects enumerated in this section,' but "is general, and therefore the 15th clause is put in before the 16th." Their lordships finally came round to the conclusion that No. 16 must be considered one of the 'subjects enumerated,' resting this, however, on the concluding clause of section 91 from which our Proposition 59 is taken, which they there considered as referring expressly to No. 16: 2nd day, at p. 95, *et seq.*

persons within the provincial jurisdiction, when called before commissions of enquiry directed under proclamation of the Lieutenant-Governor, pursuant to statute in that behalf, as witnesses, to give evidence, and making it incumbent on them to answer all pertinent questions which may be put to them.

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Provincial commissions of enquiry.

PROPOSITION 60.

60. Where the validity of a Provincial Act is in question, and it clearly appears to fall within one of the classes of subjects enumerated in section 92 of the British North America Act, the onus is on the persons attacking its validity to shew that it does also come within one or more of the classes of subjects specially enumerated in section 91.

Onus in attacking provincial Act.

This Proposition rests upon a passage in the judgment of the Privy Council in L'Union St. Jacques de Montreal *v.* Belisle.[1] The respondent in that case was contending that a certain Act of the provincial legislature of Quebec was *ultra vires*. Their lordships say in the course of their judgment[2]: "The onus is on the respondent to show that this, being of itself of a local or private nature, does also come within one or more of the subjects specially enumerated in the 91st section."[3]

[1] L.R. 6 P.C. 31, 1 Cart. 63, (1874).

[2] L.R. 6 P.C. at p. 36, 1 Cart. at p. 69.

[3] Cited per Weatherbe, J., in *Re* Windsor and Annapolis Railway, 4 R. & G. at p. 323, 3 Cart. at pp. 400-1, (1883). And see Propositions 43 and 58. As to the presumption in favour of the validity of all statutes, see Proposition 18 and the notes thereto.

PROPOSITION 61.

61. If on due construction of the British North America Act, a legislative power falls within section 92, it is not to be restricted or its existence denied because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament. Whatever power falls within the legitimate meaning of the classes in section 92, is what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the Federation Act.[1]

Bank of Toronto v. Lambe.

The above Proposition is stated and illustrated by the Privy Council in Bank of Toronto *v.* Lambe,[2] who at the same time point out the distinction existing so far as concerns limiting the range which would otherwise be open to the Federal power,[3] between the Constitution of the United

[1] Cf. Proposition 48 and the notes thereto.

[2] 12 App. Cas. at pp. 586-7, 4 Cart. at pp. 22-3, (1887). There are some brief comments on this case in 22 L.J. (Eng.) 398, reprinted in 10 L.N. 257.

[3] As to denying the existence of a legislative power, because if it existed it might be abused or might be used unwisely, Story says:—"It

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States and that of the Dominion of Canada. Having decided in favour of the validity of a certain Act passed by the Quebec legislature in 1882, whereby certain direct taxes were imposed on all banks doing business in that province, they say at the passage referred to :—"Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to erect banks. But their lordships cannot conceive that, when the Imperial parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9," (*sc.* of section 92), "is in their lordships' judgment what the Imperial parliament intended to give ; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construc-

Provincial power to tax banks.

Possible unwise exercise no ground for denying legislative power.

is always a doubtful mode of reasoning to argue from the possible abuse of powers that they do not exist :" On the Constitution of the United States, 5th ed., at p. 281. Again he says :—"Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed": *ibid.* at p. 744. See, also, *ibid.* at pp. 324-5 ; and Cooley's Constitutional Limitations, 6th ed., pp. 87-8. And cf. per Wilson, J., in Regina *v* Taylor, 36 U.C.R. at p. 202, (1875) ; per Gwynne, J., in *In re* Niagara Election Case, 29 C.P. at p. 279, (1878) ; City of Montreal *v.* Standard Light and Power Co., R.J.Q. 10 S.C. 209, 5 Q.B. 558, (1896). In another place, Story calls attention to the converse rule, "not to enlarge the construction of a given power beyond the fair scope of its terms merely because the restriction is inconvenient, impolitic, or even mischievous : " Story, *ibid.* at p. 325.

tion of the Federation Act. Their lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the Constitution of the United States. Under that Constitution, as their lordships understand, each State may make laws for itself uncontrolled by the Federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a Constitution Chief Justice Marshall found one of those limits, at the point at which the action of the State legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other. Their lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced Constitution, under which no one of the parts can pass laws for itself except under the control of the whole, acting through the Governor-General.[1] And

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Contrast between provincial powers in Canada and State powers in the United States.

[1] As to the Federal veto power in Canada, see Proposition 10 and the notes thereto. Reference may also be made to per Jetté, J., in Lambe *v.* North British and Mercantile, etc. Ins. Co., M.L.R. 1 S.C. at p. 48, 4 Cart. at p. 103; per Morrison, J., in Leprohon *v.* City of

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the question they have to answer is, whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion parliament."

The United States Constitution further compared.

The distinction here referred to between the Constitution of the United States and that of Canada had been previously pointed out by Morrison, J., in Leprohon *v.* City of Ottawa,[1] a case shortly to be discussed, and also by Palmer, J., in Ackman *v.* Town of Moncton,[2] where after remarking that, in his opinion, cases by the Courts of the United States under their Constitution are generally of little value on questions of conflict of power between the Dominion and provincial legislatures under the British North America Act, and pointing out some other points of distinction between the two Constitutions, he says[3]:—"In the United States, the States themselves granted the Federal government its power of legislation on the specific subjects, and consequently parted with it and all additional power to enable their grantees to legislate generally

Ottawa, 40 U.C.R. at p. 501, 1 Cart. at pp. 656-7; per Harrison, C. J., S.C., 2 O.A.R. at pp. 536-7, 1 Cart. at p. 608; per Burton, J., S.C. in App., 2 O.A.R. at p. 547, 1 Cart. at p. 621. As to Leprohon *v.* City of Ottawa, see *infra* pp. 671-6.

[1] 40 U.C.R. at p. 501, 1 Cart. at pp. 656-7, (1877). See *infra* p. 671 *et seq.*, as to this case.

[2] 24 N.B. 103, (1884). In this case it was held that the provincial legislature could not empower a municipality to levy a tax on the salary of an employee of the Intercolonial railway, received by him from the Dominion government. *Sed quære.* See *infra* p. 678; and cf. Fillmore *v.* Colburn, 28 N.S. 292, (1896), noted *infra* p. 677 n.

[3] 24 N.B. at pp. 115-6.

and effectually on those subjects, and they did not reserve out of such grant to themselves power to legislate on any specified subjects exclusively; and, therefore, there is nothing to prevent the operation of such grant so as to include all that may be fairly necessary to enable the Federal legislature to legislate fully and effectually with reference to all the subjects so granted,[1] and to that extent to operate as a prohibition of any legislation by the grantors that would operate to affect such subject; while with us the powers to both are given by one instrument, and all of them are made exclusive, and in construing such instrument there does not appear to be any more reason for restricting provincial legislatures from legislating on such subjects exclusively assigned to them, than the Dominion parliament from legislating on subjects exclusively put under its control. This construction not only prevents the *a fortiori* deduction[2] from the principle of the American cases, but makes the principle of them so far as they affect the questions of conflict of powers between the Federal and State legislatures,

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Provincial powers specific and exclusive.

[1]It must not be supposed from this that the Dominion parliament has not also power fully and effectually to legislate with reference to the enumerated subjects assigned to it. See Proposition 37 and the notes thereto. But by reason of having certain specified subjects of legislation exclusively assigned to them, provincial legislatures in Canada cannot be so restricted in their action as State legislatures are under the American Constitution.

[2]Some judges had expressed the view that the principle of the American decisions placing a limitation upon the powers of State legislatures where their action came into conflict with the powers of Congress, was actually more applicable to our Constitution than to that of the United States, because with us, as shown in Proposition 26, (see *supra* p. 341, *et seq.*), the reserve of legislative power is with the Dominion parliament: *e. g.*, per Spragge, C., in Leprohon *v.* City of Ottawa, 2 O.A.R. at p. 529, 1 Cart. at p. 600; per Hagarty, C. J. O., S.C., 2 O.A.R. at pp. 532-3, 1 Cart. at p. 604; per Harrison, C. J., S.C., 40 U.C.R. at p. 499, 1 Cart. at p. 654. See, also, per Duff, J., in *Ex parte* Owen, 4 P. & B. (20 N.B.) at pp. 493-4.

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entirely inapplicable to the construction of our Constitution."[1]

Thus the position seems to be this. Although when provincial legislation and Dominion legislation directly conflict with each other, the latter must prevail,[2] and although by virtue of the *non obstante* clause of section 91 of the British North America Act,[3] and the concluding clause of that section,[4] the construction of the enumerated powers conferred upon the Dominion parliament may be said to over-ride the construction of section 92,[5] yet the provinces, under our Constitution, have not, as the several States of the Union have, a general power of legislation subject only to certain specified powers which they themselves have conferred upon the Federal body,[6] but they, as well as the Dominion, have received from one and the same

Our system and that of United States contrasted.

[1] Cf. also per Palmer, J., in Queddy River Driving Boom Co. *v.* Davidson, 3 Cart. at p. 264, (1883), where the judgment is taken from the appeal book used in the Supreme Court.

[2] See Proposition 44 and 46 and the notes thereto.

[3] See *supra* pp. 427-33.

[4] See Proposition 59 and the notes thereto.

[5] See *supra* pp. 498-9, n. 3.

Powers of Congress not, as a rule, exclusive.

[6] The powers of Congress are not expressed to be exclusive, and "unless from the nature of the power, or from the obvious results of its operations, a repugnance must exist, so as to lead to a necessary conclusion that the power was intended to be exclusive, the true rule of interpretation is that the power is merely concurrent" with that of the States: Story on the Constitution of the United States, 5th ed., p. 335; per Henry, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at pp. 546-7, 2 Cart. at pp. 43-4, (1880); per Duff, J., in *Ex parte* Owen, 4 P. & B. (20 N.B.) at p. 494, (1881); per Palmer, J., in Queddy River Driving Boom Co. *v.* Davidson, *supra*. See, also, *supra* p. 527, n. 5. And as to how far there can be said to be concurrent powers of legislation in the Dominion parliament and the provincial legislatures, and how far provincial powers are contingent upon the exercise or non-exercise of Dominion powers, see Propositions 28 and 62 and the notes thereto. See, also, Proposition 55 and the notes thereto.

source, namely the Imperial parliament,[1] certain express powers of legislation upon specified subjects, which are theirs exclusively,[2] and therefore their power to legislate upon these specified subjects cannot be denied, as in the case of the States, merely because in doing so they may interfere with or restrict the range of Federal legislation.[3] But

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[1] See *supra* pp. 6-9.

[2] See this point emphasized per Dorion, C. J., in *Ex parte* Dansereau, 19 L.C.J. at pp. 231-2, 2 Cart. at p. 190, (1875); per Fournier, J., in Severn *v.* The Queen, 2 S.C.R. at pp. 124-6, 1 Cart. at pp. 468-70, (1877); per Ritchie, C. J., in Citizen's Insurance Co. *v.* Parsons, 4 S.C.R. at p. 238, 1 Cart. at pp. 288-9, (1879); per Burton, J.A., S.C., 4 O.A.R. at pp. 100-1; per Henry, J., in City of Fredericton *v.* The Queen, 3 S.C.R. at pp. 546-7, 2 Cart. at p. 43, (1880). See, however, *supra* pp. 427-33.

[3] So in Town of Windsor *v.* The Commercial Bank of Windsor, 3 R. & G. 420, 427, 3 Cart. 377, 385, (1882), Weatherbe, J., held *intra vires* a provincial Act imposing a tax on the Dominion notes held by a bank as a portion of its cash reserve, under the Dominion Act relating to banks and banking. And see per Torrance, J., in Angers *v.* Queen Insurance Co., 21 L.C.J. at p. 81, 1 Cart. at pp. 155-6; and Heneker *v.* Bank of Montreal, R. J. Q. 7 S.C. at p. 262, (1895). And contrast the view of Rainville, J., on this point in Lambe *v.* Canadian Bank of Commerce, 13 R.L. at p. 166, (1883). And it follows from what has been stated that it is not well to speak in general language, as many judges have done, of provincial legislation being *ultra vires* when it deals or interferes or meddles or comes in conflict with, or obstructs Dominion legislation: see, *e.g.*, per Ritchie, C.J., in Armstrong *v.* McCutchin, 2 Pugs. at p. 384, 2 Cart. at p. 497, (1874); per Fournier, J., in Severn *v.* The Queen, 2 S.C.R. at pp. 125-6, 133, 1 Cart. at pp. 470, 478, (1877); per Henry, J., S.C., 2 S.C.R. at pp. 136-9, 1 Cart. at pp. 480-4; per Taschereau, J., in Citizen's Insurance Co. *v.* Parsons, 4 S.C.R. at p. 312, 1 Cart. at p. 331, (1879); per Gray, J., in Tai Sing *v.* Maguire, 1 B.C. at p. 106, (1882). And where in Citizen's Insurance Co. *v.* Parsons, 7 App. Cas. at p. 109, 1 Cart. at p. 273, (1881), the Privy Council say with reference to the respective powers of the Dominion parliament and provincial legislatures, that "it could not have been the intention that a conflict should exist," the context shows that what they mean is that the intention of the Act clearly was to give power over certain specific departments of legislation to the Parliament, and over others to the provincial legislatures, and not in any case (except, of course, agriculture and immigration), to give concurrent and conflicting powers to both at once. See *supra* pp. 487-90, and Propositions 27 and 28 and the notes thereto. And cf. Bank of Toronto *v.* Lambe, 12 App. Cas. at p. 586, 4 Cart. at p. 21; in which case, in the Court below, Jetté, J., says:—"Is it not necessary to grant to the provincial legislatures the recognition in the sphere which is given to them of their full liberty of action, with the elasticity necessary to the working of all political institutions?": M.L.R. 1 S.C. at p. 46, 4 Cart. at p. 102.

Provincial tax on bank reserve.

Provincial Acts not invalid merely because interfering with Dominion legislation.

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on the other hand, the Dominion government possess what the United States government has not, a veto power over all provincial legislation.[1]

In their recent judgment in The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick,[2] the Privy Council say:—"The object of the British North America Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.[3] . . . In so far as regards those matters which by section 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. . . It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the government of Canada, and its status is in no way analogous to that of a municipal institution, which has an authority for the purpose of local administration.[4] It possesses powers not of administration

B N.A. Act does not subordinate the provinces to the Dominion.

[1] See Proposition 10 and the notes thereto.

[2] [1892] A.C. at pp. 441-3. See this case referred to, also, *supra* pp. 92-5.

[3] See Proposition 64 and the notes thereto.

[4] See Proposition 17 and the notes thereto. In *Ex parte* Dansereau, 19 L.C.J. at p. 236, 2 Cart. at pp. 198-9, (1875), Sanborn, J., says:—"The remark is as common as it is erroneous, that the legislatures of the provinces are mere large municipal corporations. It is true that every government is a corporation, but every municipal corporation is not a government. Consider the powers given exclusively

merely but of legislation in the strictest sense of that word; and within the limits assigned by section 92, of the Act of 1867, these powers are exclusive and supreme."[1] Prop. 61

And returning to the judgment of the Privy Council in Bank of Toronto *v.* Lambe,[2] it is difficult to see how the decision of the Ontario Courts in Leprohon *v.* The City of Ottawa,[3] can be maintained in view of it. There the Ontario Court of Appeal unanimously held, over-ruling the judgment of the majority of the Court of Queen's Bench, and confirming the judgment of Moss, J., at the trial, that a provincial legislature cannot impose a tax upon the official income of an officer of the Leprohon *v.* City of Ottawa.

to provincial legislatures . . . No such powers were ever conferred upon mere municipalities in their ordinary sense. They are subjects which in all nations are entrusted to the highest legislative power. Legislatures make laws, municipal corporations make by-laws." Cf. per Dorion, C. J., S.C., 19 L.C.J. at pp. 231-2, 2 Cart. at p. 190. Ramsay, J., however, points out, (S.C., 19 L.C.J. at pp. 224-5, 2 Cart. at p. 177), that though within the scope of their own functions, provincial legislatures are not subordinate, except in respect to the veto power of the Dominion government, there are many good grounds for saying that they are of inferior dignity and rank to Parliament. Cf. per Ramsay, J., in Bank of Toronto *v.* Lambe, M.L.R. 1 Q.B. at p. 182, 4 Cart. at p. 74. And see *supra* pp. 318, n. 2, 432-3. There are some remarkable words of Mr. Cardwell, late Secretary of State for the Colonies, spoken in the debate on the second reading of the British North America Act in the House of Commons, which seem worth quoting in this connection. He said:—"The provinces will, I hope, gradually approach more nearly to the character of municipal institutions than the Bill at present contemplates . . . It is well that these wise men have left it to a future time, when experience will enable them to determine how far these legislative bodies may continue to retain their inherent powers, and how far they can be reduced to the level of municipal institutions:" Hans. 3 Ser., Vol. 185, pp. 178-9. Provinces not mere municipal corporations. Mr. Cardwell.

[1] Speaking of Federal government in its perfect form, as distinguished from a mere Confederacy or system of confederate States, Mr. Freeman says:—"The State administration within its own range will be carried on as freely as if there were no such thing as an Union; the Federal administration, within its own range, will be carried on as freely as if there were no such thing as a separate State:" Federal Government, p. 9.

[2] 12 App. Cas. 575, 4 Cart. 7, (1887).

[3] 40 U.C.R. 478, 2 O.A.R. 522, (1877-8).

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Dominion government, or confer such a power on the municipalities.[1] All the judges who supported the prevailing view in this case, rested their judgments upon the principle of the decision of Marshall, C. J., in McCulloch *v.* Maryland,[2] in which it was held that a law of the State of Maryland imposing a tax upon a branch of the Bank of the United States established in that State was unconstitutional, and upon subsequent American cases upholding and illustrating the same principle. "The principles," says Harrison, C. J.,[3] "to be deduced from the (American) cases appear to be, that the National government and the State governments are, as it were, distinct sovereignties; that the means and instrumentalities necessary for the carrying on of either government are not to be impaired by the other; that as the power to tax involves the power to impair, the exercise of such a power by the one government on the income of the officers of the other is inconsistent with independent sovereignty of the other; and that in such cases exemption from taxation, although not expressed in the national Constitution, exists by necessary impli-

Provincial tax on official income of Dominion officer.

[1] The reasoning in this case was much relied on by the judges of British Columbia in the Thrasher case, 1 B.C. (Irving) 153, (1882), to support their holding that it could not be the intention of the British North America Act that provincial legislatures should have control of the Superior Court judges, whom the Dominion government was entitled to use to carry into effect the powers conferred upon it. Their judgment, however, was over-ruled by the Supreme Court of Canada: Cass. Dig. S.C. 480, 3 Cart. 320, n. See, also, as to the Thrasher case, *supra* pp. 124-126. And Leprohon *v.* City of Ottawa, was followed in the New Brunswick case of *Ex parte* Owen, 4 P. & B. (20 N.B.) 486, (1881), where the Supreme Court of the province held, (Allen, C.J., *dubitante*), that the income of an officer in the Customs who resided in the City of St. John, was not subject to taxation. And see Regina *v.* Bowell, 4 B.C. 498, (1896), noted *infra* p. 676, n. 5.

[2] 4 Wheat. 316.

[3] 40 U.C.R. at p. 499, 1 Cart. at p. 654.

cation ; ". while Hagarty, C.J., cites with approval[1] the words of Marshall, C.J., in McCulloch *v.* Maryland[2] : " If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. . . . We are relieved, as we ought to be, from clashing sovereignty ; from interfering powers ; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up ; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing enquiry so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

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Marshall, C.J., on limits of State powers of taxation.

Now it may, of course, be said that there is an obvious distinction between the case of the Bank of Toronto *v.* Lambe, and the case we have been reviewing of Leprohon *v.* The City of Ottawa, inasmuch as the former case brought into question the validity of a provincial Act which merely imposed direct taxation on banks doing business in the province, whereas in the latter the question was whether the provincial legislature could tax the official income of an officer of the Dominion gov-

[1] 2 O.A.R. at p. 536, 1 Cart. at pp. 607-8. In *Ex parte* Owen, 4 P. & B. (20 N.B.) at p. 493, (1881), Duff, J., also expresses approval of these words. See *supra* p. 672, n. 1.

[2] 4 Wheat. 316, at pp. 428-9.

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ernment, a direct instrument whereby the Dominion government executed its power; and as Harrison, C.J., observes in the latter case,[1] it does not follow from the principles laid down in the American cases relied on by himself and the other judges, "that railway corporations and other corporations, created by or under the authority of the Dominion legislature for other than government purposes, would be more free from municipal taxation than companies incorporated by the provincial legislature;" or as Burton, J.A., points out[2] echoing the distinction drawn in National Bank *v.* The Commonwealth,[3] "the doctrine which exempts the instruments of the Federal government from the influence of State taxation, being founded on the implied necessity for the use of such instruments by the government, such legislation as does not impair the usefulness or capability of such instruments to serve the government is not within the rule of prohibition."

Distinction between taxing a bank and taxing a Dominion officer.

But it is to be observed that McCulloch *v.* The State of Maryland[4] and Osborn *v.* The Bank of the United States[5] on which the Ontario judges in Leprohon *v.* The City of Ottawa principally based the decision in which so many of them concurred, were, as appears from the report of the argument in

[1] 40 U.C.R. at p. 499, 1 Cart. at p. 655. On the general subject of provincial power over Dominion railways see *supra* p. 596, n. 1.

[2] 2 O.A.R. at pp. 541-2, 1 Cart. at p. 614.

[3] 9 Wall. 353.

[4] 4 Wheat. 316. As to this case see *supra* p. 672.

[5] 9 Wheat. 738. In this case the Supreme Court of the United States, whose judgment was delivered by Marshall, C.J., adhered to its prior decision in McCulloch *v.* The State of Maryland, holding that a State cannot tax the Bank of the United States.

Bank of Toronto *v.* Lambe[1] with the further case of Railroad Co. *v.* Paniston,[2] the very cases which were cited to the Board in Bank of Toronto *v.* Lambe, to show the invalidity of the provincial Act there in question, for that "it is impossible for the Dominion legislature to exercise these powers," (*sc.*, those conferred upon it by section 91), "if banks, as such, are subject to taxation by the provincial legislatures. The power to tax involves the power to destroy." Yet the Privy Council drew no distinction on the ground that these American cases were cases of State legislation interfering with instruments of the Federal government,[3] and that the banks they were concerned with could not be so considered, but they say that the principle which under the United States decisions limit the action of State legislatures at the point at which it comes into conflict with the power vested in Congress, is inapplicable to the Constitution of the

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The basis Privy Council decision in Bank of Toronto *v.* Lambe.

[1] 12 App. Cas. at p. 579, 4 Cart. at p. 12.

[2] 18 Wall. 5. In this case the doctrine is laid down, as appears by the headnote, that the exemption of agencies of the Federal Government from taxation by the States is dependent, not upon the nature of the agents nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power; that a tax upon their property merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the States; but that a tax upon their operations being a direct obstruction to the exercise of Federal powers may not be. And this doctrine was there applied to the case of a tax by a State upon the real and personal property, as distinguished from its franchises, of the Union Pacific railroad company, a corporation chartered by Congress for private gain, and all whose stock was owned by individuals, but which Congress assisted by donations and loans, and over which it reserved and exercised many special rights, and which amongst other things was bound at all times to transmit despatches and transport mails, troops, munitions of war, etc., for the government whenever so required.

American case of Railroad Co *v.* Paniston.

[3] See on this point Osborn *v.* The Bank of the United States, 9 Wheat. at pp. 859-868.

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Dominion. That principle is described in Dobbins *v.* The Commissioners of Erie county,[1] quoted by Burton, J.A., in Leprohon *v.* City of Ottawa,[2] as a necessarily implied restraint of the States in exercising their right of concurrent legislation with the United States,[3] "when the exercise of the right by a State conflicts with the perfect execution of another sovereign power delegated to the United States"; and if this principle is inapplicable to the Constitution of the Dominion, there appears no other upon which the decision in Leprohon *v.* City of Ottawa can be rested. In this latter case, Patterson, J.A., refers to the fact that two of the learned judges, before whom the case had come in the Courts below, had held the Act in question *ultra vires* and two *intra vires*, and observes[4] :—"The difficulties indicated by this even balance of judicial opinion arise not so much from divergent views in the application of principles upon which all are agreed, as from the uncertainty as to the principles themselves upon which the solution should rest, and for this reason they can only be definitely removed by a Court of final resort." In Bank of Toronto *v.* Lambe the Court of final resort has determined the principle to be applied to such cases under the Dominion Constitution, and found it different to that applicable to similar cases in the United States."[5]

The principle of the American decisions not applicable to the Dominion.

[1] 16 Peters 435, at p. 447.

[2] 22 O.A.R. at pp. 542-3, 1 Cart. at p. 615.

[3] See *supra* p. 668, n. 6.

[4] 2 O.A.R. at p. 549, 1 Cart. at p. 623.

[5] However, notwithstanding the Privy Council judgment in Bank of Toronto *v.* Lambe, Leprohon *v.* City of Ottawa has been followed in the recent case of Regina *v.* Bowell, 4 B.C. 498, (1896), where Drake, J., held that the imposition of a poll tax upon an officer of the Dominion

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But if what has just been submitted as to Leprohon *v.* City of Ottawa be correct, *a fortiori* the decision in Coté *v.* Watson[1] would now appear unsustainable, where it was held that the Quebec License Act, 1870, in so far as it sought to impose a tax on the sum realized from the sale of an insolvent's effects when made under the Insolvent Act of 1869, 32-33 Vict., c. 16, D., (the said tax being in the form of a penalty recoverable against the assignee in insolvency for selling by auction the goods of the insolvent without taking out a license as prescribed by its provisions), was *ultra vires*,

Provincial tax on sale of insolvents' effects.

government, namely the collector of customs for the port of Vancouver, was *ultra vires*, saying at p. 500 :—"If the argument in favour of this tax is valid in regard to civil officers of the Dominion, it is equally valid as regards the officers and men of the military and naval forces stationed in the Dominion. To state the position in this way appears to me to answer the question raised, for it would certainly be treated as *ultra vires* if this tax was attempted to be collected from those who, in performance of a duty they owe to the State, are compelled to reside where ordered." It does not appear from the report that Bank of Toronto *v.* Lambe was cited or referred to in any way. See, also, per Davidson, J., in Heneker *v.* Bank of Montreal, R. J. Q., 7 S.C. at p. 265, (1895). And in another recent case of Fillmore *v.* Colburn, 28 N.S. 292, noted *sub nom.* Hillimore *v.* Colbourne, 32 C. L.J. 201, (1896), Leprohon *v.* City of Ottawa has been distinguished, the Supreme Court of Nova Scotia holding that a provincial Act requiring all the ratepayers of a section to perform statute labour on the highways or commute, was *intra vires* even when applied against a section man employed on the Intercolonial railway by the government of Canada, (McDonald, C.J., dissenting). It is remarked in the judgments that a compliance with the Act did not necessarily involve the absence of the defendant from his duty ; that he could not be exempted from the operation of the law merely because he happened to derive an income from a Dominion source ; and that it was not as though a Dominion Act had been passed to exempt employees of the Dominion government from performance of labour on the highways. Such an Act it may be observed might perhaps be upheld on the principle of Proposition 37, *q.v.* It seems scarcely necessary to notice the case of *Re* The Toronto Harbour Commissioners, 28 Gr. at p. 195, 1 Cart. at p. 825, (1881), in which Spragge, C., points out that in any case Leprohon *v.* City of Ottawa would not apply to prevent provincial authorities granting compensation to the commissioners of Toronto harbour even though that harbour may be, under the British North America Act, the property of the Dominion of Canada, when as the fact was, the Crown as represented by the Dominion government had not itself fixed any compensation for the commissioners' services.

Provincial tax on collector of customs.

Provincial tax on employee of Intercolonial railway.

[1] 3 Q.L.R. 157, 2 Cart. 343, (1877).

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the judgment stating:—"If, in order to create a source of revenue, the provincial legislature has interfered directly or indirectly so as to restrict the operation of the Insolvent Act in the results which necessarily flow from that operation, it has usurped a jurisdiction outside of the special powers conferred on it by the British North America Act." So, too, it would seem must also fall, the decision in Evans *v.* Hudon[1] that a provincial legislature has no power to declare liable to seizure the salaries of employees of the Federal government; and also those in Ackman *v.* The Town of Moncton[2] and *Ex parte* Owen,[3] already noticed.

Provincial Act rendering Dominion salaries liable to seizure.

In St. Catharines Milling and Lumber Co. *v.* The Queen,[4] Burton, J.A., applied the principle acted on in Leprohon *v.* The City of Ottawa[5] as it were conversely, and deduced therefrom a limitation to Dominion powers of legislation. Having expressed his view that certain lands there in question belonged to the province of Ontario under the British North America Act, subject to the Indian title, he says:—"Even, if I did not think the language of the British North America Act I have quoted, clearly conferred upon the provincial author-

[1] 22 L.C.J. 268, 2 Cart. 346, (1877). In Dobie *v.* The Temporalities Board, 3 L.N. at p. 248, 1 Cart. at p. 381, (1880), Ramsay, J., curiously remarks as to Evans *v.* Hudon, and Leprohon *v.* City of Ottawa, above referred to, that "these decisions can only be sustained on the ground that property in the subsection in question," (*sc.*, No. 13 of section 92, 'property and civil rights in the province'), "does not include such property and civil rights as are necessary to the existence of a Dominion object." And see *supra* pp. 583-4-5.

[2] 24 N.B. 103, (1884). See *supra* p. 666, n. 2.

[3] 4 P. & B. 487, (1881). See *supra* p. 672, n. 1.

[4] 13 O.A.R. at p. 167, 4 Cart. at p. 208, (1886).

[5] 40 U.C.R. 478, 2 O.A.R. 522, 1 Cart. 592, (1877-8). *Supra* pp. 671-6.

ities the power to extinguish the Indian title,[1] the same reasoning which compelled us to hold in Leprohon *v.* The City of Ottawa, that the local legislature had no power to tax the official income of a Dominion officer for provincial or municipal purposes, would compel us, in my opinion, to hold that the local governments alone must be the judges of the extent to which lands belonging to them shall be set apart for the use or benefit of any tribe of Indians. If the Dominion government have the power, being in its nature unlimited, it might as was pointed out in that case, be so used as to defeat the provincial power and control over these lands altogether."

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Provincial power over Indian title.

To return to the leading Proposition under discussion, in view of the Dominion power over the regulation of trade and commerce, its principle may be said to be illustrated by the recent decision of the Privy Council in The Brewers and Malster's Association of Ontario *v.* The Attorney-General of Ontario,[2] wherein they held, affirming the decision of the Ontario Court of Appeal,[3] that an Ontario Act, R.S.O.,c. 194, s. 51, subs. 2, requiring every brewer, distiller, or other person, though duly licensed by the government of Canada for the manufacture and sale of fermented, spirituous and other liquors, to take out licenses to sell the liquors manufactured by them, and pay a license fee therefor, was *intra vires*. And the same may be said of the decision of the Supreme Court in Fortier *v.* Lambe,[4] holding *intra vires* a Que-

Provincial tax on brewers licensed by the Dominion.

[1] See *supra* p. 593, n. 2.

[2] [1897] A.C. 231.

[3] January 14th, 1896, unreported. Their lordships followed their prior decision in Regina *v.* Halliday, 21 O.A.R. 42, (1893), *supra* p. 361, n. 2.

[4] 25 S.C.R. 422, (1895). For the case below see R.J.Q., 5 S.C. 47, 355. This case also decided, illustrating thereby the latter portion of

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bec Act imposing a license fee on every trader doing business in Montreal by wholesale, or by wholesale and retail. In both cases the tax in question was held to be a direct tax, [1] Bank of Toronto *v.* Lambe,[2] being specially cited and relied upon. At p. 430 of the latter case, Taschereau, J., says:—"If this is a direct tax, *cadit quæstio*, this statute is *intra vires;* the fact that it might involve in a certain degree a regulation of trade and commerce cannot deprive a provincial legislature of the right to raise a revenue by means of direct taxation, or impair such right in any way.[3]

Provincial right of direct taxation.

And if the conclusions above arrived at are sound, it would seem incorrect to deny to the provincial legislatures jurisdiction to prohibit the manufacture of spirituous liquors in the province, or the importation of them into the province, merely for the reason that prohibition to that extent would affect the revenue of the Dominion derived from the

the leading Proposition, that the want of uniformity or equality in the apportionment of the tax is not a ground for declaring it unconstitutional.

[1] As to what are direct taxes, see Proposition 66, and the notes thereto.

[2] 12 App. Cas. 575. 4 Cart. 7, (1887).

[3] But as to the meaning of 'regulation of trade and commerce,' in No. 2 of section 91, of the British North America Act, see *supra* p. 551, *et seq.* In Severn *v.* The Queen, 2 S.C.R. 70, 1 Cart. 414,(1878), all the Supreme Court judges had agreed that to impose a license fee on brewers for purposes of provincial revenue, was *ultra vires* of the province as falling within No. 2 of section 91. In that case, too, (2 S.C.R. at pp. 120-1, 126-7, 1 Cart. at pp. 464-6, 471-2), Fournier, J., regards as applicable to the Dominion the reasoning of Marshall, C. J., in Brown *v.* State of Maryland, 12 Wheat. 419, where the latter held that a State law requiring importers of foreign merchandise, or such other persons as should sell by wholesale such merchandise, to take out licenses before selling the same, was void, because it came into conflict with the power of Congress to regulate exterior commerce. Cf. per Gray, J., in Tai Sing *v.* McGuire, 1 B.C. (Irving) at p. 106, (1882). *Sed quære.* If, as it would seem, such taxation would be direct taxation, it appears clear on the Privy Council decision in Bank of Toronto *v.* Lambe, that it would be within the provincial power. And see *supra* p. 361, n. 2, and the notes to Proposition 66.

customs and excise duties. Yet this is the view expressed by two of the judges of the Supreme Court in the recent Liquor Prohibition case.[1] But on appeal to the Privy Council, their lordships expressed the opinion that provincial legislatures would have jurisdiction so to prohibit the manufacture, "if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province."[2] And though, in answer to the question:—'Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province,' they reply that—"it appears to them that the exercise by the provincial legislature of such jurisdiction, in the wide and general terms in which it is expressed, would probably trench upon the exclusive authority of the Dominion parliament,"[3] it seems clear enough from certain observations in the course of the argument already referred to in the notes to Proposition 59,[4] that the view they took was that such legislation, because it interfered with Dominion revenue and excise, among other reasons, could not be said to relate to 'matters of a merely local or private nature in the province,' within the meaning of No. 16 of section 92 of the British North America Act, on which it was necessary to found the right so to legislate if such right existed. The interference with Dominion revenue and excise was not in their lordships' view, it seems clear, a ground for denying the power to provincial legislatures if such

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Provincial powers of prohibiting sale and manufacture of intoxicating liquors.

[1] Per Strong, C.J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 204; per King, J., S.C. at p. 262, (1895).

[2] [1896] A.C. at p. 371.

[3] *Ibid.*

[4] *Supra* pp. 656-7.

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legislation had come within section 92, but it took the legislation out of the only class of section 92 which could possibly be relied on to support it.

As to the last portion of the Proposition under discussion, which lays it down that the possibility of the unwise exercise of legislative power in no way warrants a denial of its existence, Ramsay, J., says in *Re* Cotte[1]:—"The Courts cannot enquire as to the mode of exercising a power, but only as to its existence." And in Municipality of Cleveland *v.* Municipality of Brompton[2] the same learned judge says:—"It is not the province of the Courts to guide the policy of the legislature. They may consider the reason of a law to interpret its doubtful provisions, or to give effect to the manifest intentions of the legislator, but they have no right to suspend the operation of an Act clearly expressed."[3]

Possible unwise exercise no ground for denying legislative power.

[1] 19 L.C.J. at p. 216, 2 Cart. at p. 224, (1875).

[2] 4 L.N. at p. 279, 2 Cart. at p. 244, (1881).

[3] And so per Draper, C.J., in *Re* Goodhue, 19 Gr. at p. 383, 1 Cart. at pp. 567-8, (1872); per Ritchie, C.J., in City of Fredericton *v.* The Queen, 3 S.C.R. at p. 535, 2 Cart. at p. 34, (1880); per Osler, J.A., in *In re* Bell Telephone Co., 7 O.R. at p. 608, 4 Cart. at p. 622, (1884), a case also referred to *supra* p. 443; per Weatherbe, J., in City of Halifax *v.* Western Assurance Co., 6 R. & G. at p. 393, (1885); per Begbie, C.J., in Attorney-General of British Columbia *v.* City of Victoria, 2 B.C. (Hunter) at p. 5, (1890); per Begbie, C.J., in The Queen *v.* Howe, *ibid.* at p. 37, (1890). See, also, *supra* p. 663, n. 3. In *Re* Goodhue, 19 Gr. at p. 415, Spragge, C., says:—"It is hardly necessary to say that we are not entitled to attribute to the legislature mistake or ignorance in regard to anything that is done by it." See as this case, *supra*, p. 281. In his Law of the Constitution, (4th ed. at p. 60), Professor Dicey says:—"A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral, or because it went beyond the limits of parliamentary authority." And as to any enquiry into the motives of the legislature in exercising its power, see Proposition 20 and the notes thereto.

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62. A Provincial Legislature is not incapacitated from enacting a law otherwise within its proper competency merely because the Dominion Parliament might under section 91 of the British North America Act, if it saw fit so to do, pass a general law which would embrace within its scope the subject matter of the Provincial Act.

Provincial Act for relief of a Society in financial difficulties.

The above leading principle is affirmed and illustrated by the Judicial Committee of the Privy Council in L'Union St. Jacques de Montreal *v.* Belisle,[1] where they held that a certain Act of the legislature of Quebec, passed for the relief of a benefit and benevolent Society in Montreal named L'Union St. Jacques de Montreal, was within the legislative capacity of that legislature. As the judgment points out,[2] the Act dealt solely with the affairs of that particular Society and in this manner: taking notice of a certain state of embarrassment resulting from what is described in substance as improvident regulations of the Society, it imposed a forced commutation of their existing rights upon two widows, who, at the time when

[1] L.R. 6 P.C. 31, 1 Cart. 63, (1874). See this case further referred to *supra* pp. 280-1, 568-71.

[2] L.R. 6 P.C. at p. 35, 1 Cart. at p. 69.

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the Act was passed, were annuitants of the Society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of the affairs of the Association. Their lordships held that clearly this matter was private and local, relating as it did to a benevolent or benefit Society incorporated in the City of Montreal within the province, which appeared to consist exclusively of members who would be subject *primâ facie* to the control of the provincial legislature.[1] They, however, allude[2] to the hypothesis stated in argument by Mr. Benjamin of a law having been previously passed by the Dominion parliament to the effect that any Association of that particular kind throughout the Dominion on certain specified conditions, assumed to be exactly those which appeared upon the face of the statute in question, should thereupon *ipso facto* fall under the legal administration in bankruptcy or insolvency; and say that they are "by no means prepared to say that if any such law as that had been passed by the Dominion legislature it would have been within the competency of the provincial legislature afterwards to take a particular Association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency. But," they add, "no such law ever has been passed; and to suggest the possibility of such a law as a reason why the power of the provincial legislature over this, a local and private Association, should be in abeyance or altogether taken away, is to make a suggestion, which, if followed up to its consequences, would

Provincial legislation not invalid because possible Dominion legislation might supercede it.

[1] See Proposition 68 and the notes thereto.

[2] L.R. 6 P.C. at pp. 36-7, 1 Cart. at pp. 70-1.

go far to destroy that power in all cases." They point out that upon the same principle, because under No. 7 of section 91 of the British North America Act, the Dominion parliament has the exclusive right of legislating as to all matters coming under the head of 'militia, military and naval service and defence,' and because any part of the land in the province of Quebec might be taken by the Dominion legislature for the purpose of military defence, and because that which had not been done as to some particular land might possibly have been done, therefore, it not having been done, all power over that land, and therefore over all the land in the province of Quebec is taken away so far as it relates to legislation concerning matters of a purely local or private nature, which they say they think neither a necessary or reasonable, nor a just or proper construction. As Ramsay, J., says in Dobie *v.* The Temporalities Board,[1] referring to this decision of the Privy Council in L'Union St. Jacques de Montreal *v.* Belisle:—"When the question is between the authority of Parliament and that of a local legislature the forbearing to legislate in a particular direction by Parliament may leave the field of local legislation more unlimited."

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If Dominion forbears to legislate, it leaves provincial powers unfettered.

Thus as Lord Watson observed in the course of the argument on the Liquor Prohibition Appeal, 1895, one of the oldest principles of the law governing the exercise of legislative power in Canada to be found is this, that "there are matters with which the province can deal, which are not excepted from their legislative jurisdiction until the Dominion government has proceeded to act upon the powers given to it by certain sub-sections of section 91."[2]

[1] 3 L.N. at p. 250, 1 Cart. at p. 382, (1880).

[2] Printed report at p. 245. See p. 398, n. 1. See, also, *supra* pp.

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And another example in point is suggested by the report of Sir John Thompson, as Minister of Justice, of January 28th, 1889, upon the Nova Scotia Acts of 1888, where he says in reference to an Act in relation to the public health, which authorized the Governor-in-Council to regulate 'so far as this legislature has jurisdiction in this behalf, with a view of preventing the spread of infectious disease, the entry or departure of boats or vessels at the different ports or places in Nova Scotia, etc.':—"The British North America Act gives exclusive legislative power to the parliament of Canada in respect of quarantine, navigation, and shipping. It would clearly not be competent for a provincial legislature to make an enactment relating to the arrival of vessels, vehicles, passengers or cargoes from places outside the province, but it may be that provincial control may be exercised in relation to transport from one port of the province to another, subject, of course, to any regulation on the subject of quarantine by the Federal authority."[1]

Public health and quarantine.

411-2. In Citizens Insurance Co. *v.* Parsons, 7 App. Cas. at p. 113, 1 Cart. at pp. 278-9, (1881), the Privy Council said that it was unnecessary there "to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects; questions of this kind it may be observed arose and were treated of by this Board in the cases of L'Union St. Jacques de Montreal *v.* Belisle, L.R. 6 P.C. 31, 1 Cart. 63, and Cushing *v.* Dupuy, 5 App. Cas. 409, 1 Cart. 252." See also their judgment in the Liquor Prohibition Appeal, 1895, [1896] A.C. 348 at p. 363. As to Cushing *v.* Dupuy, see *supra* pp. 425-7.

Criminal law and penal law

[1] Hodgins' Provincial Legislation, 2nd ed., p. 582. Cf. *ibid.* at pp. 946-7. As to whether the fact of the Dominion parliament having drawn an act into the domain of criminal law, interferes with the provincial legislature also making similar acts penal, see *supra* pp. 412-14; and cf. per Dugas J., in Regina *v.* Harper, R.J.Q. 1 S.C. at pp. 333-5. And as to whether provincial powers can be restricted or placed in abeyance by the very fact that the Dominion parliament has not seen fit to act in the premises, or has enacted only subject to local

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We have already seen[1] that where such a general law as is referred to in the leading Proposition is passed, provincial legislation which directly conflicts with it is superceded and placed in abeyance by it. But the case of *Ex parte* Ellis,[2] seems to point a useful warning against too readily concluding that such a conflict exists. There it was contended that a provincial Act which enabled a judge to order the imprisonment of a person making default in the payment of a sum due on a judgment, if among other things, the liability was incurred by obtaining credit under false pretences or by means of any other mode for which he might be proceeded against criminally, conflicted with section 127 of the Insolvent Act of 1875, 38 Vict., c. 16, D., by which a judge might discharge a debtor confined in goal or on the limits in any civil suit, who had *bonâ fide* made an assignment as provided for in the Act. But the judgment of the Supreme Court of New Brunswick, delivered by Allen, C. J., points out that, admitting that a debtor imprisoned under the New Brunswick Act might be entitled to be discharged under the Insolvent Act, his imprisonment might yet be perfectly legal up to the time that he proved himself entitled to be discharged under the provisions of the Insolvent Act; and that there might, also, be cases of imprisonment under the provincial Act of persons not subject to the provisions of the Insolvent Act, in which cases no question of con-

Imprisonment of debtors and insolvency laws.

option, which has not declared in favour of the operation of the Act, see *supra* pp. 534-7.

[1] See Proposition 46 and the notes thereto. See, also, Proposition 44.

[2] 1 P. & B. at pp. 598-9, 2 Cart. at pp. 534-5, (1878). Also referred to *supra* p. 415.

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[1] Cf. per Savary, Co. J., in *In re* Killam, 14 C.L.J.N.S. at pp. 242-3, (1878), quoted *supra* p. 531; and see Gould *v.* Ryan, 26 N.S. 461, (1894), holding a provincial Act authorising a judge to order payment of a debt by instalments *intra vires*.

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63. Within the area and limits of subjects mentioned in section 92 of the British North America Act Provincial Legislatures are supreme, and have the same authority as the Imperial Parliament or the Parliament of the Dominion would have, under like circumstances, to confide to a municipal institution or body of its own creation, authority to make by-laws or regulations as to subjects specified in the enactment and with the object of carrying the enactment into operation and effect.

Hodge *v.* The Queen.

This Proposition rests upon the language and decision of the Privy Council in Hodge *v.* The Queen.[1] It has been pointed out in connection with Proposition 17, the notes to which should be referred to here, that in this case their lordships say that the British North America Act conferred upon the provincial legislatures by section 92, "powers not in any sense to be exercised by delegates from or as agents of the Imperial parliament, but authority as plenary and as ample within the limits prescribed as the Imperial parliament in the plenitude of its power possessed and could bestow." They follow that passage with the words embodied

[1] 9 App. Cas. 117, 3 Cart. 144, (1883).

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in Proposition 63, and continue[1]:—"It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail.[2] The very full and very elaborate judgment of the Court of Appeal[3] contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience.[4] It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of law to decide. Their lordships do not think it necessary to pursue this subject further, save to add that, if by-laws or resolutions are warranted, power to enforce them seems necessary and equally lawful." And so they held that the Ontario legislature had power to entrust to a Board of commissioners authority to enact regulations, in the nature of by-laws and municipal regulations of a merely local character, for the good government of taverns; and thereby to create

Delegation is not self-effacement.

[1] 9 App. Cas. at p. 132, 3 Cart at pp. 162-3.

[2] See this passage quoted *supra* at p. 129; and generally Proposition 8 and the notes thereto.

[3] 7 O.A.R. 246, 3 Cart. 166.

[4] See, also, for examples of delegation of legislative power, an article in 18 C.L.J. 431. There is also an article on the delegation of legislative functions in 3 C.L.T. 279, written, however, before the above judgment of the Privy Council.

offences and annex penalties thereto, in the manner purported to be done by the Liquor License Act, R.S.O. 1877, c. 181. Prop. 63

As Cross, J., says in Molson *v.* Lambe[1]:—"The object the Imperial legislature must have had in view was the distribution of powers, plenary in their nature, between two bodies, who should each have full exercise of the authority to them respectively attributed. It was not the case of a supreme legislature giving limited authority to a subordinate administrative tribunal, supposed, therefore, to retain all the power not specifically or in exact terms conferred." Nor was it, it may be added, a case such as is found in the various States of the Union. There the people of the State, having all legislative power reserved to them, subject to the powers granted to Congress,[2] and subject to certain restrictions in the Constitution of the United States, themselves form a Constitution for their own State, and thereby delegate some only of their own powers of legislation to the State legislature; and, as we have seen[3] the State legislatures possessing only delegated powers, cannot delegate them to any other person or body. But even there, it is held, that the bestowal upon municipal corporations of such powers of making by-laws as are commonly bestowed upon them is not to be considered as trenching upon the maxim that legislative power must

Legislative powers under B.N.A. Act are plenary; And not like those of State legislatures.

[1] M.L.R. 2 Q.B. at p. 393, 4 Cart. at p. 360, (1886).

[2] 'The powers, not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people:' Art. 10 of amendments to the Constitution of the United States. See also Art. 9.

[3] *Supra* p. 249. And so Cooley's Constitutional Limitations, 6th ed., p. 137; Bryce American Commonwealth, (2 Vol. ed.), Vol. 1, pp. 451-2.

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not be delegated.[1] "Municipal corporations," says Field, J., in Meriwether *v.* Garrett,[2] "are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text writers."[3]

Legislature can only delegate powers it itself possesses.

Of course, as Dunkin, J., observes in Cooey *v.* The Municipality of the County of Brome,[4] "for a legislature of strictly limited jurisdiction, nothing is clearer than that it can delegate no powers beyond those it can directly exercise." And so in their recent judgment on the Liquor Prohibition Appeal, 1895, the Privy Council says[5]:—"Until Confederation the legislature of each province as then constituted could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the parliament of Canada. Since its date, a provincial legislature cannot delegate any power which it does not posess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of section 92,

[1] Cooley's Constitutional Limitations, 6th ed., p. 138.

[2] 102 U.S. at p. 511.

[3] Cited by Ritchie, C.J., in Lynch *v.* Canada North-West Land Co., 19 S.C.R. at p. 209, (1891).

[4] 21 L.C.J. at p. 186, 2 Cart. at p. 388, (1877). And see this case further noticed, *supra* pp. 521-2, where the subject of the power of the Dominion parliament to confer powers and impose duties on municipal corporations, a subject also suggested by some words in the leading Proposition, is somewhat discussed.

[5] [1896] A.C. at p. 364.

other than No. 8."[1] On the other hand the constitutionality of an Act cannot be affected by any by-law or regulation made under it, if there be nothing unconstitutional in the Act itself.[2] Prop. 63

In accordance with the decision of the Privy Council in Hodge *v.* The Queen, above referred to, in Attorney-General of British Columbia *v.* Milne,[3] the Health Act of British Columbia, (C.S.B.C. 1888, c. 55), having enacted that the Lieutenant-Governor in Council might make, repeal and vary such rules, regulations, and by-laws, as he might deem expedient as to the establishment, management and maintenance of local Boards of Health, their functions and powers, and that such regulations 'shall have the force of law and be so recognized in all Courts of the province,' the Divisional Court, (affirming Begbie, C. J.), held the Act *intra vires*, and that it meant that the regulations should have the force of statute law, and that such regulations, when passed, superseded all provincial and municipal enactments inconsistent with themselves.[4] Delegation to Lieut.-Governor in Council.

[1] As to their interpretation of No. 8 of section 92, see *supra* p. 398, n. 1.

[2] And so per Ritchie, C.J., and Fisher, J., in *Ex parte* Renaud, 1 Pugs. at pp. 290, 299-300, 2 Cart. at pp. 470, 483-5.

[3] 2 B.C. (Hunter) 196, (1892).

[4] On the other hand it certainly seems at variance with Hodge *v.* The Queen, which, however, does not appear to have been cited, to hold as Wurtele, J., did in Tarte *v.* Béïque, M.L.R., 6 S.C. at p. 296, (1890), that a provincial legislature, notwithstanding No. 15 of section 92 of the British North America Act, has no authority to delegate power to fix the amount of the fine or penalty or the term of imprisonment for a violation of its laws to commissioners conducting an enquiry into matters connected with the good government of the province, although it may fix a maximum and minimum, leaving a discretion between them. "The legislature," he says, "has no power to decree that the punishment of an offender should be at the discretion and according to the will of the Court before which he might be tried." His decision, however, was reversed on appeal, *sub nom.* Turcotte *v.* Whalen, M.L.R., 7 Q.B. 263. See as to this case, also, *supra* p. 387. As to No. 15 see also Aubry *v.* Genest, R.J.Q., 4 Q.B. 523, (1895). Delegation of powers of punishment.

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Legislation by reference.

Dominion Act as to jurors.

And although a distinction may be drawn between delegation of legislative power, and legislation by reference to the enactments of another legislative body,[1] the decision in Regina *v.* O'Rourke,[2] is also in entire accordance with the subsequent decision of the Privy Council in Hodge *v.* The Queen,[3] and with the leading Proposition. It was there decided that the Dominion enactment, 32-33 Vict., c. 29, s. 44, that 'every person qualified and summoned as a grand juror or as a petit juror in criminal cases, according to the laws which may be then in force in any province of Canada, shall be, and shall be held to be, duly qualified to serve as such juror in that province, whether such were laws passed before or be passed after the coming into force of the British North America Act, 1867, subject always to any provision in any Act of the parliament of Canada, and in so far as such laws are not inconsistent with any such Act,' was *intra vires*.[4] And the Court of Queen's Bench in Montreal held likewise in Regina *v.* Prevost.[5] And in view of these authorities one

[1] Cameron, J., says in Regina *v.* O'Rourke, 1 O.R. at p. 481, 2 Cart. at p. 658, (1882), that the distinction is a fine one. Wilson, C.J., however, had drawn it in that case in the Court below, 32 C.P. at p. 402, 2 Cart. at p. 661; and see per Hagarty, C.J., S.C., 1 O.R. at p. 475. Mr. Todd also draws it, (Parliamentary Government in the British Colonies, 2nd ed., p. 570), saying that it is not competent for the Dominion parliament "to delegate its functions to the local legislature, so as by an absolute grant of discretionary power to enable the local authority to deal with the matter itself. It is otherwise, however, if the Dominion parliament merely accepts and ratifies arrangements made or to be made in accordance with its own legislation on the subject, etc." See *infra* pp: 697-700.

[2] 32 C.P. 388, 1 O.R. 464, 2 Cart. 644, (1882).

[3] 9 App. Cas. 117, 3 Cart. 144, (1883).

[4] Wilson, C.J., refers to 35 Vict., c. 14, s. 2, D., which enacts that the voters' lists in Ontario for Dominion elections shall be the same as in elections for the Ontario legislature, as legislation of the same kind: S.C. 32 C.P. at p. 402, 2 Cart. at p. 660.

[5] M.L.R. 1 Q.B. 477, 29 L.C.J. 253, (1885). See, too, Sproule *v.* Reginam, 2 B.C. (Irving) 219. In his report of May 10th, 1892, upon

may even doubt the soundness of Proudfoot, J.'s dictum in International Bridge Co. *v.* Canadian Southern R. W. Co.,[1] that :—" Were the Canadian parliament to say that Canadian subjects and Canadian corporations were to be subject to legislation that might be passed by Congress, it would, I apprehend, be unconstitutional; it would be authorizing a foreign power to legislate for its subjects; an abdication of sovereignty inconsistent with its relation to the Empire of which it forms a part." As is pointed out in the passage above cited from Hodge *v.* The Queen,[2] there is no abdication of sovereignty in legislating by delegation, nor is there in legislating by relation or reference.

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Legislation by reference to laws of Congress.

A curiously complicated example of the delegation of legislative power by Parliament may be found in section 308 of the Dominion Railway Act of 1888, 51 Vict., c. 29. Certain railways having been declared to be works for the general advantage of Canada by Parliament in 1883, and thereby brought under Dominion jurisdiction,[3] it was enacted by the above section :—'The Governor-General may at any time and from time to time, by proclamation or proclamations confirm any one or more of the Acts of the legislature of any province of Canada, passed before the passing of this Act, relating to any railway which, by an Act of the parliament of

Delegation to Governor-General of power to apply provincial Acts to Dominion railways.

certain British Columbia Acts of 1891, Sir John Thompson, Minister of Justice, says of chapter 14,—an Act to further amend the Jurors Act :—" The sections of this Act 8 to 15 inclusive deal with the subject of juries in connection with the trial of criminal cases. In the view of the undersigned those provisions have to do exclusively with procedure in criminal matters as distinguished from the constitution of Courts of criminal jurisdiction, and are therefore beyond the provincial jurisdiction": Hodgins' Provincial Legislation, 2nd ed., p. 1125. See also *supra*, p. 465, n. 1.

[1] 28 Gr. at p. 134, (1880).

[2] *Supra* p. 690. See also *infra* pp. 697-700.

[3] As to such declarations, see *supra* p. 603, n. 2; also p. 596, n. 1.

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Canada has been declared to be a work for the general advantage of Canada, and from and after the date of such proclamation the Act or Acts thereby declared to be confirmed, shall be confirmed, ratified and made as valid and effectual as if the same had been duly enacted by the parliament of Canada.'

An interesting point in connection with the subject of delegating legislative powers, and legislating by relation and reference, is raised by Sir Barnes Peacock, in the argument before the Privy Council in Hodge *v.* The Queen. There, as we have seen, the question was as to the power of the Ontario legislature to entrust to a Board of commissioners authority to enact regulations for the good government of taverns, and at the place referred to,[1] Sir Barnes Peacock observes:—"Another difficulty which occurs to my mind is this, that these resolutions or laws or whatever they may be called, would not require the assent of the Lieutenant-Governor, whereas, if they were passed by the legislative assembly, they would require that assent." And Mr. Horace Davey, as he then was, met this objection as follows, to the complete satisfaction apparently of the Board:—"I answer that the Lieutenant-Governor, when he assented to the Act by which these commissioners were empowered to make rules and regulations, consented to the rules and regulations which they might make, and it is just the same as if the enactments were in this form, 'it shall be an offence against the law of the province to commit any infractions of the rules and regulations to be made by the commissioners.' The Lieutenant-Governor assented to that, and impliedly he assented to the infractions of these rules and regulations being

Delegation of law-making power no infringement on veto power of Crown.

[1] Dom. Sess. Pap. 1884, Vol. 17, No. 30, at p. 113.

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treated as an offence against the law of the province, in just the same way as when Her Majesty assented to the Act of Parliament by which the judges were empowered to frame rules of procedure, she assented to these rules of procedure, when framed by Her Majesty's judges, being part of the law of the land. You may say it is part of the Constitution of this country that every Act shall be assented to by Her Majesty, and no doubt it is; and you may say that the rules and regulations made by the School Board or by other bodies under statutory powers,— the by-laws or rules, or whatever they may be, made under statutory powers—have not been assented to by the Queen, and therefore have not the force of law according to the Constitution of the country. But the answer is that when Her Majesty assents to a law empowering a body to make rules and regulations for carrying general legislation into execution and detail, the Crown authorizes those, and gives its assent to legislation in this form, that these rules and regulations shall have the force of law, or that any infringement of the rules and regulations to be made by the body shall be an offence against the law and shall be punishable accordingly."[1]

Crown's assent to delegating Act is also assent to what delegates may do under it.

A further question which suggests itself in connection with the present subject is whether the Dominion parliament or the provincial legislatures could create in Canada and arm with general legislative authority a new legislative power not created or authorized by the British North America

[1] It may be noted that under the Imperial Municipal Reform Act, 1835, 5-6 Will. IV., c. 76, s. 90, the Crown was invested with authority to disallow corporation by-laws: Todd's Parliamentary Government in the British Colonies, 2nd ed., at p. 428. And in connection with the above, reference may be made to some remarks in 3 C.L.T. at pp. 285-7, which it is submitted are sufficiently answered in the text.

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Act. The judgment of the Privy Council in the Queen *v.* Burah,[1] points the other way.[2] They were there dealing with the powers of the Governor-General of India in Council under the India Councils Act, 24-25 Vict., c. 67, whereby power was given to him to make laws and regulations for all places and for all persons and things whatever within the Indian territories under the dominion of Her Majesty, and they held that he had power to legislate conditionally.[3] But they say in the passage above referred to :—" Their lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority a new legislative power, not created or authorized by the Councils Act. Nothing of that kind has in their lordships opinion, been done or attempted in the present case." And it may be observed that while speaking thus, they also use language of the Indian legislature, very similar to that above quoted from their judgment in Hodge *v.* The Queen,[4] and embodied in Proposition 17, in reference to the plenary powers of legislation possessed by Canadian legislatures. However, in his argument before the Board in Hodge *v.* The Queen,[5] Mr. Horace Davey contended that under the British North America Act, the provincial legislatures are freed from the qualification suggested by the decision in Queen *v.* Burah, above referred to, because, he said, under

Queen *v.* Burah.

Creation of new legislative body.

[1] 3 App. Cas. at p. 905, 3 Cart. at pp. 428-9, (1878).

[2] And so per Begbie, C.J., in The Thrasher case, 1 B.C. (Irving) at p. 175, (1882).

[3] See *supra* p. 496.

[4] *Supra* p. 689.

[5] Dom. Sess. Pap. 1884, Vol. 17, No. 30, p. 10 .

No. 1 of section 92, they can amend the Constitution of the province, except as regards the office of Lieutenant-Governor, and so, "they could do what Lord Selborne, no doubt correctly, said in that case," (Queen *v.* Burah), "the Indian legislature could not do, abdicate their whole legislative functions in favour of another body, and, as a matter of fact, one of the provinces has abolished its House of Lords, has abolished its legislative council, and it has only one Chamber."[1] But a little earlier in the same argument[2] on the words above quoted from the Queen *v.* Burah being cited by Mr. Jeune, Sir A. Hobhouse had said:—"That must be what you are now speaking of as abdicating their functions, which they cannot do. They remain invested with a responsibility. Everything is done by them and such officers as they create and give discretion to. There must be some power of conferring discretion." However as we have seen[3] they held that in the case before them

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Delegation is not abdication of functions.

[1] As to No. 1 of section 92 of the British North America Act see *supra* p. 100. In the recent argument in Fielding *v.* Thomas, [1896] A.C. 600, before the Privy Council, Lord Watson observed:—"I take it under the power given to the provincial legislature by the statute of 1867, the provincial legislature had the same power to alter and amend its Constitution by its own legislative Act as the Imperial parliament of Great Britain possessed at that date. It could give to itself any power which the parliament of Great Britain could constitutionally have given": Manuscript transcript from Cock and Kight's notes, p. 23. And later on in the same argument, on counsel observing:—"The Canadian parliament has no power at all given to it to alter the Constitution of Canada," Lord Davey said:—"That is a big question that it would be unwise to express any opinion upon. There is 'peace, order and good government of Canada': " *ibid.* p. 47. Cf. the report of Sir J. Macdonald, M.J., of July 14th, 1869: Hodgins' Provincial Legislation, 2nd ed., at p. 83. In the judgment in Fielding *v.* Thomas the Board held that No. 1 of section 92 authorises provincial legislatures to pass Acts for defining their own powers and privileges: [1896] A.C. at p. 610. In *Ex parte* Dansereau, 19 L.C.J. at pp. 224-5, 2 Cart. at p. 177, (1875), Ramsey, J., says that No. 1 of section 92 in its widest sense would amount to a power to upset the British North America Act.

No. 1 of sect. 92, B.N.A. Act.

Provincial power to amend Constitution.

[2] Dom. Sess. Pap. 1884, No 30, p. 70.

[3] *Supra* pp. 689-91.

Prop. 63 of the delegation to a Board of commissioners of authority to enact regulations for the good government of taverns, and impose penalties for their violation, there had been no such abdication of functions.[1]

[1] In his Essay on the Government of Dependencies, (ed. 1891, at pp. 88-9), Sir G. Cornewall Lewis discusses, in abstract fashion, whether there can be a dependency of a dependency, and whether a subordinate government can create a subordinate government, and arrives at the conclusion that "provided such a delegation be not prohibited by the laws of the supreme government, a subordinate government may make a general delegation of its powers with respect to a portion of the territory subject to it."

PROPOSITION 64.

64. The aim of the law-giver in dividing the legislative powers by sections 91 and 92 of the British North America Act between the Federal Government and the Provinces was, so far as compatible with the new order of things, to conserve to the latter their autonomy in so far as the civil rights peculiar to each of them were concerned.

Provincial autonomy under B.N.A. Act.

The words of this Proposition are taken from the judgment of Fournier, J., in the Citizens Insurance Co. *v.* Parsons.[1] He was there dealing with the contention that the Ontario Act to secure uniform conditions in policies of fire insurance was *ultra vires* on the ground that the power of legislating in reference to the subject matter of insurance belonged to the Federal parliament, as the necessary sequence of its exclusive power to regulate trade and commerce,[2] and said: "In order to determine the scope of the second paragraph of section 91, it should not be read alone, but on the contrary, it should be taken in connection with the whole of the provisions of the Consti-

[1] 4 S.C.R. at p. 255, 1 Cart. at p. 302, (1880). The original French of the concluding words is:—"Leur autonomie sous le rapport des droits civil particuliers à chacune d'elles."

[2] Under No. 2 of section 91; as to which see *supra* p. 551, *et seq.* And see Heneker *v.* Bank of Montreal, R.J.Q. 7 S.C. at p. 263, (1895).

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tutional Act, in order to arrive at a conclusion conformable to the spirit of the Act and to give effect to all its provisions." Then follow the words of the leading Proposition, and he continues: "We would, however, arrive at a very different result if we gave to paragraph 2 the extended meaning that might be given to it if taken literally." As Mr. Benjamin expressed it on the argument before the Privy Council in Russell *v.* The Queen[1]:—"Whatever was domestic, whatever was private, whatever was home rule was to be left with the provinces. Their domestic institutions, their home rule was not to be interfered with."

Provinces have home rule.

Whether the recognition of this feature of the scheme of Confederation can be of much, or any, assistance in the construction of the words of the British North America Act, it is referred to in many cases. Thus in The Liquidators of the Maritime Bank of Canada *v.* The Receiver-General of New Brunswick,[2] the Privy Council say:—"The object of the British North America Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy." And in Attorney-General of Ontario *v.* Mercer,[3] Ritchie, C. J., observes, "special pains appear to me to have been taken to preserve the autonomy of the provinces, so far as it could be consistently with a federal union." And in Hodge

They are not subordinated to the Dominion.

[1] See *supra* p. 398, n. 1.

[2] [1892] A.C. at pp. 441-3. As to this case see *supra* pp. 93-5.

[3] 5 S.C.R. at p. 637, 3 Cart at p. 28, (1883).

v. The Queen,[1] Spragge, C. J., says, "The provinces had possessed plenary powers upon subjects of a local and domestic nature before Confederation; and the general scheme of Confederation appears to have been to leave to them the plenary control of these subjects. They were, under the Act, legislatures in regard to these subjects in the true and full sense of the term. This is the more apparent from the use of the words 'exclusive' and 'exclusively,' (and they are used repeatedly), in the Imperial Act."[2] Prop. 64

In conclusion the following passage from the argument of Mr. Edward Blake before the Privy Council in St. Catharines Milling and Lumber Co. *v.* The Queen,[3] may be quoted in this connection:— Mr. Blake on the general scheme of the B.N.A. Act.

"What then was the general scheme of the Act? First of all, as I have suggested, it was to create a federal, as distinguished from a legislative union; but a union composed of several existing and continued entities. It was not the intention of Parliament to mutilate, confound and destroy the provinces mentioned in the preamble, and, having done so, from their mangled remains, stewed in some legislative caldron, to evoke by some legislative incantation absolutely new provinces into an absolutely new existence. It was rather, I submit, the design and object of the Act, so far as was consist-

[1] 7 O.A.R. at p. 252, 3 Cart. at p. 167, (1882).

[2] To the above may be added the words of Mathieu, J., in The Export Lumber Co. *v.* Lambe, 13 R.L. at pp. 84-5:—"Par cet Acte de 1867, qui a été passé à leur demande et conformément à leur désir, elles n'ont pas renoncé à leur autonomie, mais ont conservé, pour leur gouvernement interne, tous leur droits, pouvoirs et prérogatives." Cf., also, per Strong, C.J., in Huson *v.* The Township of South Norwich, 24 S.C.R. at p. 150.

[3] Published at the press of the Budget, 64 Bay street, Toronto, 1888, *sub nom.* 'The Ontario Lands Case'; see at pp. 6-7.

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ent with the re-division of the then province of united Canada into its old political parts, Upper and Lower Canada, and with the federal union of the four entities, Nova Scotia, New Brunswick and the resettled parts of old Canada, Ontario and Quebec,—it was the design I say, so far as was consistent with these objects, by gentle and considerate treatment to preserve the vital breath and continue the political existence of the old provinces. However this may be, they were being made, as has been well said, not fractions of an unit, but units of a multiple. . . Thus I ask your lordships to say that the scheme was one for preserving and not for destroying the provinces, and for securing to them equal rights and similar conditions.[1] And if so we must seek an interpretation preservative and not destructive, and a construction equalising and not discriminating."[2] As might be expected, however, their lordships in giving their judgment,[3] avoided entering upon these general considerations, and confined themselves strictly to the interpretation of section 109 and the other sections of the British North America Act, immediately bearing upon the question before them.

The old provinces not destroyed but continued.

[1] See Proposition 65 and the notes thereto.

[2] And see *supra* p. 16; and the notes to Propositions 1 and 2 generally. Reference may also be made to Fielding *v.* Thomas, [1896] A.C. at pp. 610-11, as to the continuance under section 88 of the British North America Act of the ante-Confederation Constitution of the legislature of the province of Nova Scotia. See also *supra* pp. 64-9.

[3] 14 App. Cas. 46, 4 Cart. 107, (1888). See *supra* pp. 591-2.

PROPOSITION 65.

65. Co-equal and co-ordinate legislative powers in every particular were conferred by the British North America Act on the Provinces. The Act placed the Constitutions of the Provinces on the same level.[1]

Provincial powers, co-ordinate and similar.

The words of the first clause of the above Proposition are taken from the judgment of Strong, J., in Severn *v.* The Queen,[2] who referring to the judgment of Richards, C. J., in that case, and in Slavin *v.* The Village of Orillia[3] says :—"I am unable to accede to the doctrine that we are to attribute to the words 'other licences,'" (*sc.* in No. 9 of section 92 of the British North America Act), "the same meaning as though the expression had been 'such other licenses as were formerly imposed in the province,' or equivalent words. The result of

[1] "The plan of division of the governmental and legislative authority, under the written constitution of the United States, between the Federal and State governments, though it produces a certain uniformity by its limitations of Federal powers, and its prohibitions upon State powers, yet allows of the growth of diversity and dissimilarity in the State governments. The framers of the Canadian constitution hoped to produce a greater uniformity and simplicity by limiting the authority of the provincial legislatures, and vesting the residue in the Dominion parliament": Article by Mr. E. Meek on Federal Government and the Distribution of Powers in the Canadian Federal System, in *The American Law Review*, Vol. 30, pp. 203-4.

[2] 2 S.C.R. at p. 109, 1 Cart. at p. 453, (1878).

[3] 36 U.C.R. 159, 1 Cart. 688, (1875). See *supra* pp. 46-7. And as to 'other licenses' in No. 9 of section 92, see *supra* p. 27, n. 1, and *infra* pp. 725-6.

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such a construction would be that the same words would have a different meaning in different provinces, and that the several provincial legislatures would have different powers of taxation, though the power is included in the same grant. This, it appears to me, would be in direct contravention of the principle which forbids a different interpretation being given to a general law in different localities, however much local laws or usages may favour such diverse interpretations. However, apart from authority, I cannot think this was the intention of the Imperial parliament. I think everything indicates that co-equal and co-ordinate legislative powers in every particular were conferred by the Act on the provinces, and I know of no principle of interpretation which would authorise such a reading of the British North America Act as that proposed. Had such been the design of the framers of the Act, the meaning of which I can only discover from the words in which it is expressed, we should have found the case provided for."[1] And so Ritchie, J.,

Provincial powers co-ordinate and similar.

[1] In the course of the argument in the matter of the Dominion License Acts, 1883-4, Strong, J., referred to and re-affirmed these words of his: Dom. Sess. Pap. 1885, No. 85, at pp. 83, 177. But in the recent case of Huron *v* The Township of South Norwich, 24 S.C.R. at pp. 150-1, he withdraws from this position, saying:—"If the words 'municipal institutions' in sub-section 8", (of section 92 of the British North America Act), "are to have any meaning attributed to them, they must surely be taken as giving authority to repeal, re-enact, and re-model the laws relating to all municipal legislation then in force. . . In the case of Severn *v.* The Queen, 2 S.C.R. 70, I expressed some doubt as to the decision in Slavin *v.* The Village of Orillia, 36 U.C.R. 159, upon the ground that the effect of that case would be to make the law vary in the different provinces. These observations were not material to the judgment I then gave, which was founded entirely on the 9th sub-section of section 92, and I have now come to the conclusion that they were not well founded." But the weight of authority is altogether in favour of the leading Proposition. In the course of the argument in the recent Brewers and Maltsters Association case, [1897] A. C. 231, *supra* p. 679, *infra* pp. 725-7, Lord Herschell observed:—"There is very great difficulty in construing section 92, which applies to all the provinces, and saying that the powers of the provincial legislature would differ according to what had been done by the prov-

Change of opinion by Strong, C. J.

in the same case[1] says :—" If the law at the time of Confederation is to be looked at as affording a key to the construction of the statute, then the state of the law throughout the Dominion must, I think, be looked at, and not that of any individual province, as I think it clear that the statute was to have a uniform construction throughout the whole Dominion, and the powers of all the local legislatures were to be alike." And so, also, per Taschereau, J., in Mercer *v.* The Attorney-General for Ontario[2]; and per Burton, J. A., in Regina *v.* The St. Catharines Milling and Lumber Co.[3] And in their recent decision in The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick,[4] the Privy Council have stated, in the words of the second clause of the leading Proposition, that the British North America Act placed the constitutions of all provinces within the Dominion on the same level; and that what is true with respect to the legislature of Ontario is equally applicable to the legislature of New Brunswick.

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Provincial constitutions are on same level.

So, of the province of British Columbia, Begbie, C. J., says, in the Thrasher case[5]:—" It seems to be too clear for argument that whatever the nature or derivation of the local legislature previously and

inces prior" to Confederation: Manuscript transcript from Marten Meredith and Henderson's shorthand notes, p. 80. And as to the meaning of 'municipal institutions in the province,' in No. 8 of section 92, see the judgment of the Privy Council on the Liquor Prohibition Appeal, 1895, [1896] A. C. at pp. 363-4; and *supra* p. 398, n. 1.

[1] 2 S.C.R. at p. 99, 1 Cart. at p. 442. And see, generally, *supra* pp. 41-71.

[2] 5 S.C.R. at p. 669, 3 Cart. at p. 52, (1881).

[3] 13 O.A.R. at p. 164, 4 Cart. at p. 206, (1886).

[4] [1892] A.C. at p. 442.

[5] 1 B.C. (Irving) at p. 162, (1882). See, also, S.C. at pp. 156, 212.

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up to the 20th of July, 1871, everything became, as has been said, completely extinct on the admission of British Columbia into the Dominion, and that all the legislatures of the present statutory provinces have precisely the same authority within their respective geographical limits, namely, that given to them by the British North America Act, and no other authority; and that, not by transmission or inheritance, but solely and entirely by virtue of the Act." So, also, with regard to Manitoba, in the Manitoba School case, Strong, C. J., says[1]:—"It is not to be presumed that Manitoba was intended to be admitted to the Union upon any different terms from the other provinces, or with rights of any greater or lesser degree than the other provinces. Some differences may have been inevitable owing to the difference in the pre-existing conditions of the several provinces. It would be reasonable to attribute any difference in the terms of Union, and in the rights of the province to this, and as far as possible by interpretation to confine any variation in legislative powers and other matters to such requirements as were rendered necessary by the circumstances and condition of Manitoba at the time of the Union." But in their judgment on appeal, the Privy Council say[2]:—"Their lordships do not think that anything is to be gained by the inquiry how far the provisions of this section," (*sc.* section 22 of the Manitoba Act 1870, 33 Vict. c. 3, D., whereby Manitoba was created a province of the

British Columbia.

Manitoba.

Pre-existing conditions may occasion some variations.

[1] *In re* Certain Statutes of the Province of Manitoba relating to Education, 22 S.C.R. at p. 657, (1894). On the subject of reading the provisions of the British North America Act into special statutes admitting provinces into Confederation, see S.C. at pp. 635-8, 654, 674, 702, 712.

[2] Brophy *v.* The Attorney-General of Manitoba, [1895] A.C. pp. 214-5.

Dominion), "placed the province of Manitoba in a different position from the other provinces, or whether it was one more or less advantageous. There can be no presumption as to the extent to which a variation was intended. This can only be determined by construing the words of the section according to their natural signification."[1] Prop. 65

Lastly it may be mentioned, in connection with the Proposition under consideration, that a principle has been established with regard to the disallowance of Acts by the Governor-General, that where Acts of doubtful validity have been left to their operation in certain provinces, similar Acts passed in other provinces should not afterwards be disallowed.[2] Exercise of Federal veto.

[1] In his argument before the Board in this case, Mr. Edward Blake said :—"I submit that the general view of the original British North America Act, and the general view of the Manitoba Act, was to put all the provinces as near as may be on the same footing as to the rights given by the Act. As I have said before I never have suggested anything so absurd as that it was intended by a stroke of the pen to alter the conditions which existed in different provinces on many local points. But when the British North America Act was providing for their inclusion in the federation, the general intent of that Act, as indicated by its provisions, is to put the provinces as near as may be on the same footing with reference to their rights under the Act:" Printed report, at p. 111. See p. 398, n. 1, *supra*. B. N. A. Act places provinces on same footing.

[2] See for example Hodgins' Provincial Legislation, 2nd ed., at pp. 244a-244b, 817. But for cases where, upon an Act deemed objectionable being passed by a provincial legislature, the attention of the Lieutenant-Governor has been called to the objection which existed to such enactments, and his advisers have been notified in due time to obtain a repeal of the statute, though similar Acts by other provinces have been allowed to go into operation, see Hodgins' *ibid.* Vol. 2, at pp. 31-2, 60-4, 314-5, 342. And as to the Federal veto power generally see Proposition 10 and the notes thereto.

PROPOSITION 66.

66. The Provincial Legislatures have no powers excepting the enumerated powers which are given to them by the British North America Act. They cannot legislate beyond the prescribed subjects.

Provincial powers of taxation specially discussed.

Provinces have only the enumerated powers.

That this Proposition expresses the view of the Privy Council we have seen clearly stated in those passages from their judgments in Citizens' Insurance Co. *v.* Parsons,[1] and Russell *v.* The Queen,[2] upon which Propositions 43 and 58 are based; and in Bank of Toronto *v.* Lambe,[3] they state that they "adhere to the view which has always been taken by the Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the Parliament."[4]

[1] 7 App. Cas. at p. 109, 1 Cart. at p. 273, (1881).

[2] 7 App. Cas. at p. 836, 2 Cart. at p. 19, (1882).

[3] 12 App. Cas. at pp. 587-8, 4 Cart. at pp. 23-4, (1887).

[4] In this passage, however, (see *supra* pp. 2-3), where they were immediately referring to powers of taxation, the Privy Council certainly seem to speak as though they do not consider the matter so entirely concluded, as to debar counsel hereafter, should occasion arise, from arguing before them :—"that the provincial legislatures possess powers of legislation either inherent in them, or dating from a time anterior o the Federation Act, and not taken away by that Act." See *supra* pp. 63-69, 170, and *infra* p. 741 *et seq.*; also Propositions

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However, in the course of the argument before the Supreme Court, in the matter of the Dominion Liquor License Acts, 1883-4, Strong, J., is reported as saying[1] :—"It has been assumed that all that is not expressly given to the provinces is exclusively reserved to the Dominion. Now, there are no words in the Act to that effect. The enumerated powers are exclusively given to the Dominion, but there is nothing to say that anything beyond the enumerated powers is exclusively given to the Dominion. It is out of the question to say that. The treaty rights of the province of Quebec would be utterly gone and annihilated if you said that the corporate powers

The form of sect. B.N.A. Act

1, 2, and 65, and the notes thereto. The following are references to dicta supporting the leading Proposition: Regina *v.* Justices of Peace of King's County, 2 Pugs. at p. 541, 2 Cart. at p. 507, (1875); Cotte's case, 19 L.C.J. at p. 215, 2 Cart. at pp. 223-4, (*supra* pp. 66-7); Severn *v.* The Queen, 2 S.C.R. at p. 128, 1 Cart. at p. 472, (1878); Lenoir *v.* Ritchie, 3 S.C.R. at pp. 610, 612, 1 Cart. at pp. 515-6, 518, (1879); S.C. 3 S.C.R. at p. 625, 1 Cart. at p. 531; City of Fredericton *v.* The Queen, 3 S.C.R. at p. 557, 2 Cart. at p. 51, (1880); S.C. 3 S.C.R. at p. 536, 2 Cart. at p. 35; The Thrasher case, 1 B.C. (Irving) at pp. 198-9, 205, (1882); Reed *v.* Mousseau, 8 S.C.R. at pp. 418-9, 3 Cart. at p. 199, (1883); Regina *v.* Wing Chong, 2 B.C. (Irving) at p. 156, (1885); Attorney-General of Canada *v.* Attorney-General of Ontario, 23 S.C.R. at p. 475, (1894); *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 258, (1895), where King, J., says that if a power exists in the provinces, it must be found in the enumerations of section 92, "or in what is reasonably and practically necessary for the efficient exercise of such enumerated powers, (subject to the provisions of section 91)," as to which see *supra* pp. 454-68. In Lord Monck's despatch to the Secretary of State of November 7th, 1864, transmitting the Quebec Resolutions, he says of the provincial legislatures:—"To these local bodies are to be entrusted the execution of certain specified duties of a local character, and they are to have no rights or authority beyond what is expressly delegated to them by the Act of Union:" Can. Sess. Pap., 1865, Vol. 3, No. 12. And in moving the second reading of the British North America Bill in the House of Commons, on February 28th, 1867, Mr. Adderley, Under-Secretary of State for the Colonies, said: "The power of the provincial legislatures in reference to legislation will be confined to a certain number of specified subjects": Hans. 3rd Ser. Vol. 185, p. 1167. For the opposing view, see *supra* pp. 10, n. 1, 12-16. As to the use of the term 'legislature,' as distinguished from the term 'parliament,' reference may be made to Mr. Justice Loranger's letters upon the interpretation of the Federal Constitution, (1st letter), at p. 31 *et seq.*

Dicta supporting the leading Proposition.

[1] Dom. Sess. Pap. 1885, No. 85, at p. 185. And *cf.* per Mathieu, J., in The Export Lumber Co. *v.* Lambe, 13 R.L. at pp. 88-9, (1885).

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of the provinces before Confederation were to be utterly wiped away by the British North America Act." But Mr. Bethune, who was of counsel, replied that as he understood them the decisions of the Privy Council seemed to point to that; and in the notes to Proposition 26 the Privy Council decisions on the matter have been referred to. But it must not be forgotten that, as there pointed out,[1] among the powers expressly given to the provinces is what may be termed a minor residuary gift of power to make laws in relation to 'generally all matters of a merely local or private nature in the province'; and there would seem to be no doubt that in respect to any subject matter of legislation not within the enumerated classes of section 91, a provincial legislature can make laws in relation to it of a local or private nature in the province; while if it is also not within any of the specified subjects in section 92, the Dominion parliament can legislate upon it for the peace, order, and good government of Canada generally.[2]

Provincial power over local or private matters generally.

The general subject of provincial powers of taxation, hitherto undealt with in detail in this work, may be appropriately discussed in connection with this Proposition.[3] In this case, as generally, any powers they have must be looked for in section 92 of the British North America Act. It is true that in Bank of Toronto *v.* Lambe,[4] Baby, J., claims for the provincial legislature, as "one of its inherent

[1] See *supra* p. 343. And *cf.* per Ramsay, J., in Bank of Toronto *v.* Lambe, M.L.R. 1 Q.B. at p. 183, 4 Cart. at p. 75, (1885).

[2] See *supra* pp. 360, n. 1; 399-401; 437-8; 655 *et seq.*

[3] As to provincial taxation generally in relation to Dominion powers and objects, see *supra* pp. 671-80.

[4] M.L.R. 1 Q.B. at p. 197, 4 Cart. at p. 88, (1885). Cf. per Mathieu, J., in Export Lumber Co. *v.* Lambe, 13 R.L. at p. 117, (1885).

powers," the right to levy money by any mode or system of taxation within the province and for provincial ends, saying :—" A people can undoubtedly tax itself through its legislators in parliament assembled. . . The general powers of taxation cannot be impliedly taken away from them. It requires an express and clear enactment of the law to deprive them of what is a primary right. There is nothing of the kind, however, in the (British North America) Act." But we have already seen how the Privy Council treated this claim of inherent powers, and that it is opposed to the authorities.[1] Prop. 66

Now as Gwynne, J., says in Reed *v.* Mousseau,[2] the only subsections of section 92, which expressly authorise the raising by Act of the provincial legislatures of any revenue whatever, by any system of taxation, are Nos. 2, 9, and 15. The last, dealing with the imposition of punishment by fine, penalty, or imprisonment, we need not concern ourselves with here. No. 2, however, empowers the legislatures exclusively to make laws in relation to ' direct taxation within the province in order to the raising of a revenue for provincial purposes ;' and in connection with this several questions arise, and first as to what is ' direct taxation,' within the meaning of this clause. Provincial powers of taxation.

This question has been brought before the Privy Council in four cases. The first was Attorney-General for Quebec *v.* The Queen Insurance Co.,[3] where however the Board did not find it necessary to

[1] *Supra* pp. 2-3, 710. See, also, per Strong, J., in Reed *v.* Mousseau, 8 S.C.R. at pp. 418-9, 3 Cart. at p. 199, (1883).

[2] 8 S.C.R. at p. 431, 3 Cart. at p. 208. Cf. per Dorion, C.J., S.C. 3 Cart. at p. 213. The public property and assets transferred to each province constitute an additional source of revenue.

[3] 3 App. Cas. 1090, 1 Cart. 117, (1878). *Supra* p. 373.

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consider the scientific definition of direct or indirect taxation, because they found that whether as used by political economists, or in jurisprudence in the Courts of law, or in the popular use, the term 'direct taxation' was held not to apply to the tax they had to deal with, namely, a stamp imposed by statute on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt, in a Court of law, if the stamp was not affixed.[1]

Direct taxation.

Taxation by law stamps.

The next case in which the matter came before the Board, is Attorney-General of Quebec *v.* Reed,[2] where the tax in question was a stamp duty of ten cents imposed by a Quebec Act on every exhibit produced in Court in any action depending therein. Their lordships say that the view more favourable to the tax being a direct tax was that of Mill and those who agree with him, namely, that a direct tax is "one which is demanded from the very persons

Stamp Acts.

[1] In Attorney-General of Quebec *v.* Reed, 3 Cart. at pp. 220-1, Ramsay, J., comments on the Privy Council judgment in this case, and denies that it "implies that a duty being subject to collection by means of a stamp, makes it necessarily indirect taxation." He says: "No one can seriously contend as an abstract question, I should think, that the form of collection, the evidence of payment, can determine as to the nature of the impost. If there was a poll-tax on each elector and the law said that each elector should take a receipt therefor on paper, bearing a penny stamp, it would hardly be said that the penny stamp was a different kind of taxation from the poll-tax." What he says the Privy Council decided was "only that the duty sought to be collected in that case, by a so called license, was in reality an ordinary Stamp Act, and indirect taxation." And in Choquette *v.* Lavergne, R.J.Q. 5 S.C. at pp. 122-3, (1893), Pelletièr, J., speaks to the same effect and gives illustrations of his meaning:— "Que la taxe s'appelle timbre ou autrement, peu importe, car pour la qualifier, il faut examiner son incidence." So, also, per Lacoste, C.J., S.C. in App. R.J.Q. 3 Q.B. at pp. 308-9. See further as to this case, *infra* p. 716, n. 1. See, too, Todd's Parl. Gov. in Brit. Col., 2nd ed. at p. 549.

[2] 10 App. Cas. 141, 3 Cart. 190, (1883), followed Plummer Wagon Co. *v.* Wilson, 3 M. R. 68; and see some remarks by "R" in 8 L. N. 58. The 9th Resolution at the Inter-provincial Conference at Quebec in 1887, protested against the result of this decision, and declared in favour of the amendment of the British North America Act so as to expressly give the provinces the right to legislate as to fees payable in legal proceedings in the provincial Courts, and apply the revenue thence derived to provincial purposes. See *supra* p. 196, n. 2.

who it is intended or desired should pay it," while indirect taxes are "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another;" but that even on this view of the matter the tax was not direct, for from the very nature of legal proceedings, "until they terminate, as a rule and speaking generally, the ultimate incidence of such a payment cannot be ascertained. . . The legislature in imposing the tax, cannot have in contemplation one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else. . . . In truth that is a matter of absolute indifference to the intention of the legislature. On the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified, and the law which enacts it cannot assume that that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumed incidence may be altered.[1] An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements

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Definition of direct taxation.

Taxation by law stamps.

[1] Cf. The Brewers and Maltsters Association of Ontario *v.* The Attorney-General for Ontario, [1897] A.C. at p. 237, where the Privy Council say :—"If the legislature were under the guise of direct taxation, to seek to impose indirect taxation, nothing that their lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise." See, also, Proposition 32 and the notes thereto, *supra* p.p 373-81.

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between the parties determining who shall bear it.[1] The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment, and if at the time the ultimate incidence is uncertain, then, as it appears to their lordships, it cannot, in this view be called direct taxation within the meaning of the second section of the 92nd clause of the Act in question."

Bank of Toronto *v.* Lambe.

The third case in which this matter came before the Board was Bank of Toronto *v.* Lambe,[2] and their lordships' judgment therein can be best referred to in their own words in the subsequent case of The Brewers and Maltsters Association of Ontario *v.* The Attorney-General for Ontario,[3] which is the last of the four cases alluded to. They there say: "The question what is 'direct taxation' within the meaning of sub-section 2 does not come now before this Board for consideration for the first time. In the case of the Bank of Toronto *v.*

[1] It might seem from the context, that the Privy Council here intimate the view that a stamp duty upon transactions of purchase and sale would be an indirect tax, by reason of the uncertainty of the ultimate incidence of it. But in Choquette *v.* Lavergne, R.J.Q. 5 S.C. 108, in App. sub nom. Lamonde *v.* Lavergne, R.J.Q. 3 Q.B. 303, (1893-4), a Quebec Act imposing a tax for provincial purposes on sales of immoveable property of 1½ cents on the dollar upon the value, which tax was to be paid in stamps before the registration of the transfer in addition to payment either in money or stamps of the registrar's charges for recording the deed, was held a direct tax and *intra vires*. The judgment of the Privy Council in Attorney-General of Quebec *v.* Reed was referred to. Lacoste, C.J., says: "Dans l'èspece, le droit de mutation est imposé sur l'acheteur. C'est lui seul que le législateur a en vue, c'est le plus intéressé et bien souvent le seul intéressé, comme dans le cas où le vendeur recoit son prix au comptant. Lorsqu'il paie, il n'a pas l'espoir de se récupérer. Un immeuble n'est pas, de sa nature, un objet de commerce, que l'on achète pour revendre et l'achéteur ne peut en général compter sur une revente pour se refaire:" R.J.Q. 3 Q.B. at p. 308. Cf. per Pelletier, J., S.C., R.J.Q. 5 S.C. at pp. 121-3.

Stamp duty on sale transactions.

[2] 12 App. Cas. 575, 4 Cart. 7, (1887).

[3] [1897] A.C. 231.

Lambe, it was necessary to put a construction on those words. The legislature of Quebec had imposed a tax on every bank carrying on business within the province. This tax was a sum varying with the paid-up capital, with an additional sum for each office or place of business. The question at once arose, was this 'direct taxation'? . . . The legislation impeached was held valid on the ground that the tax imposed was direct taxation in the province within the meaning of sub-section 2. . . Their lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists[1] but in what sense the words were employed by the legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious *indicia* of direct and indirect taxation, which were likely to have been present to the minds of those who passed the Federation Act."[2]

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Taxation of banks.

'Direct taxation' in No. 2 of sect. 92, B.N.A. Act.

[1] In the judgments in the Courts below in this case the views of economists are much considered and discussed. The judgments of Mathieu, and Rainville, J.J., not printed in Mr. Cartwright's collection, will be found in 13 R.L. 68, 125.

[2] For Mill's definition referred to, see *supra* pp. 714-5. A writer in 22 L.J. Eng. at p. 398, (quoted 10 L.N. 257), seems somewhat hypercritical in his remarks on this use of Mill's definition by the Privy Council. He says: "The citation of J. S. Mill for a definition of indirect taxation in an Act of parliament was not happy. For purposes of legislation and political economy Mill's distinction that indirect taxes are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another was sufficient. His point of view was that of the statesman; but when the powers of a legislature are concerned, it is necessary to look not at the intention of the legislature, but at the effect of the Act." In the first place, as shown in the text, the Board do not quote Mill's words as a binding legal definition; and, in the second place, the words of Lacoste, J., in Lamonde *v.* Lavergne, R.J.Q. 3 Q.B. at p. 307, in reference to this use of Mill's definition, seem to afford a sufficient answer: "Ce désir, cette intention, cette expectative se présument et s'infèrent non pas tant des termes du statut que de ce qui arrive dans le cours ordinaire et natural des choses. C'est à dire que le taxe est 'direct' ou 'indirect' suivant que celui qui la paie d'après le cours ordinaire des choses, se récupère ou ne se récupère pas."

Mill's definition of direct taxation.

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In the course of their judgment they point out that though it is quite proper, or rather, necessary, to have careful regard to the opinions of writers on political economy on the subject of what is 'direct' and what is 'indirect' taxation, yet "it must not be forgotten that the question is a legal one, namely, what the words mean as used in this statute, while the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the word 'direct' and 'indirect' according as they find that the burden of a tax abides more or less with the person who first pays it," whereas, "the legislature cannot possibly have meant to give a power of taxation, valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line, referable to and ascertainable by the general tendencies of the tax, and the common understanding of men as to those tendencies.[1] They reject as certainly incorrect "for legal purposes," the view attributed to Mill, that "to be strictly direct, a tax must be general," but they take his definition "as a fair basis for testing the character of the tax in question"; not, however, "with the intention that it should be considered a binding legal definition, but because it seems to them, to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act."[2]

The political economists.

The statutory meaning of 'direct taxation.'

The last of the four cases in which the meaning of 'direct taxation' in No. 2 of section 92 of the British North America Act has come before the

[1] 12 App. Cas. at pp. 581-2, 4 Cart. at p. 15.
[2] 12 App. Cas. at pp. 582-3, 4 Cart. at pp. 16-7.

Privy Council is that of The Brewers and Maltsters Association of Ontario *v.* The Attorney-General for Ontario,[1], where they hold that the provincial legislature has power, in order to raise a revenue for provincial purposes, to impose a license fee on brewers, distillers, and other persons, though duly licensed by the government of Canada, for the manufacture and sale of fermented, spirituous, or other liquors, for licenses to sell within the province the liquors manufactured by them, as had been done by R.S.O. c. 194, s. 51, which imposed a license fee of $100 upon every such brewer and distiller for license to sell wholesale within the province, and that this was direct taxation, within No. 2 of section 92.[2] After referring, as has been seen, to their prior decision of Bank of Toronto *v.* Lambe, and Mill's definition, their lordships say:—"In the present case, as in Lambe's case, their lordships think the tax is demanded from the very person whom the legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place, or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee, trifling in amount, imposed alike upon all the brewers and distillers without any relation to the quantity of goods which they sell. It cannot have been intended by the imposi-

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The Brewers and Maltsters case.

License tax on wholesale dealers.

[1][1897] A.C. 231.

[2]For the previous authorities in favour of the view that such taxation on trades and businesses is direct and not indirect taxation, see *supra* p. 361, n. 2; cf. Bank of Toronto *v.* Lambe, 13 App. Cas. at at p. 584, 4 Cart. at pp. 18-9, (1897); and Lambe *v.* Fortier, R.J.Q. 5 S.C. 47, 355, 25 S.C.R. 422, (1894-5).

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tion of such a burden to tax the customer or consumer. It is, of course, possible that in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax."[1]

[1]This case was a reference of certain questions by the Lieutenant-Governor in Council, and one of these questions was, whether, if the imposition of such license fee was *intra vires*, "must one and the same fee be exacted from all such brewers, distillers, and persons?" The Ontario Court of Appeal, by their judgment of January 14th, 1896, unreported, answered this question in the negative in accordance with the prior case of Fortier *v.* Lambe, R.J.Q. 5 S.C. 47, 355, 25 S.C.R. 422, (1894-5). Cf., also, Dow *v.* Black, L.R. 6 P.C. at p. 282, 1 Cart. at p. 107, (1875), where the Privy Council decided that No. 2 of section 92 "must be taken to enable the provincial legislature, wherever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province;" and see Proposition 17 and the notes thereto. In The Brewers and Maltsters Association case no appeal was taken to the Privy Council in regard to the answer to the above question. Hence in entire accordance with that omnipotence of Canadian legislatures within their respective spheres, which is one of the points in which, in the words of the preamble of the British North America Act, the Dominion has 'a constitution similar in principle to that of the United Kingdom,' there is no such necessity for uniformity and equality of taxation with us as exists in the United States, where the constitution provides by Article 1, section 3, that 'direct taxes shall be apportioned among the several States. . . . according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons,' and by Article 1, section 8, that 'all duties, imports, and excises, shall be uniform throughout the United States'; and that 'no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' Hence it would seem that no tax can be a direct tax in the sense of the United States constitution, which is not capable of apportionment according to the rules thus laid down; and it has been seriously doubted if, in the sense of that constitution, any taxes are direct taxes, except those on polls or on lands: Story on the Constituion of the United States, 5th ed., Vol. 1, pp. 703-4. Hence the American decisions as to what are 'direct taxes' within the United States constitution are inapplicable to the constitution of the Dominion. See this point of distinction pointed out and commented on: per Dorion, C.J., in Bank of Toronto *v.* Lambe, M.L.R. 1 Q.B. at p. 125-6, 4 Cart. at p. 26; per Tessier, J., S.C., M.L.R. 1 Q.B. at p. 163, 4 Cart. at p. 57; per Jetté, J., S.C., M.L.R. 1 S.C. at p. 36, 4 Cart. at p. 93; per Pelletier, J., Choquette *v.* Lavergne, R.J.Q. 5 S.C. at p. 115. See, also, *supra* pp. 254-5. In Fortier *v.* Lambe, R.J.Q. 5 S.C. 47, however, Tait, J., quotes a very apposite passage from Cooley on Taxation, that: "Taxes are said to be direct, under which designation would be included those which are assessed upon the property, person,

Provincial taxation need not be equal and uniform

Difference in this respect from the United States constitution.

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It remains, before passing on to the next point to be considered, to notice the recent case of Re Yorkshire Guarantee and Securities Corporation, (Limited),[1] in which the Supreme Court of British Columbia held unanimously that a tax imposed by the provincial Assessment Act, (C.S.B.C. 1888, c. 111, s. 3), upon mortgages was a direct tax and *intra vires*, notwithstanding the evidence showed that the company required their mortgagors to recoup the amount. At p. 274, Drake, J., says:—"The intention of the legislature is that the owner of the personalty is to bear the tax; it is imposed on him, and he is the person intended to bear it. It is not imposed on him with a view that someone else (the mortgagor) shall bear it, or that it shall be distributed over a class of persons. The tax is not imposed on the dollars, but on the owners of the dollars. Customs duties are imposed on the goods, not on the owner of the goods. I cannot see how the appellants in this case can escape from the decision of Bank of Toronto *v.* Lambe.[2] This tax appears to me to fall within the indicia laid down by the Privy Council in that case for discriminating between a direct and indirect tax."[3]

Provincial tax on mortgages

business, income, etc., of those who are to pay them; and indirect are those which are levied on commodities before they reach the consumer and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market prices of the commodity."

[1] 4 B.C. 258, (1895).

[2] See *supra* pp. 716-8.

[3] In a report as Minister of Justice, of December 24th, 1894, Sir C. H. Tupper says: "The question may arise whether taxation which renders both the owner, occupier, and tenant of land liable for a tax, the amount of which is arrived at having regard to the extent and value of the land so owned, occupied, or held under lease, is not indirect, and therefore *ultra vires* of a provincial legislature: Hodgins' Provincial Legislation, 2nd ed., p. 1229. In Le College de Médecins v. Brigham, 16 R.L. 283, (1888), it was held that a provincial Act requiring all members of the College of Physicians and Surgeons of the province to pay two dollars for the use of the College was *intra vires*.

Taxes in respect of land.

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A further question however arises with regard to No 2 of section 92 of the British North America Act besides that of the meaning of 'direct taxation,' namely whether the words 'in order to the raising of a revenue for provincial purposes,' indicate that direct taxation may not be resorted to by a provincial legislature in order to raise a revenue for local or municipal purposes, as distinguished from general provincial purposes. This has been supposed to be the intent of the clause by some judges,[1] and colour is lent to such a view by the fact that No. 9 of section 92, expressly authorizes legislation in relation to the licenses there referred to 'in order to the raising of a revenue for provincial, local, or municipal purposes.' However in Dow *v.* Black,[2] where the constitutionality of a provincial Act authorizing the inhabitants of a parish to raise by direct taxation, within the parish, a subsidy for a certain railway came into question, and it was contended that

No. 2 of sect. 92 B.N.A. Act.

'Provincial purposes.'

[1] See *e.g.* per Weatherby, J., in City of Halifax *v.* Western Assurance Co., 18 N.S. at p. 392, (1885); per Begbie, C.J., in Regina *v.* Mee Wah, 3 B.C. at pp. 404-5, (1886). As recently as on the argument in The Brewers and Maltsters Association of Ontario *v.* Attorney-General for Ontario, [1897] A.C. 231, (*supra* p. 679), Sir R. Couch, no doubt forgetting for the moment the decision in Dow *v.* Black referred to in the text, is reported as saying: "May it not mean this. By sub-section 2, there is a power of direct taxation for provincial purposes, then by sub-section 9 is not the power of direct taxation by licenses given, not only for provincial purposes, but for municipal purposes. That might reconcile the two:" Manuscript transcript from notes of Marten Meredith and Henderson, at p. 58. And see *ibid.* at pp. 52-3, where Lord Herschell said in reference to this point, addressing Mr. Edward Blake, who was arguing: "You would say that a local or municipal purpose is a provincial purpose." To which Mr. Blake replied: "Yes, and I may say that the vast mass of the whole of the enormous municipal expenditure of the province of Ontario is borne by direct taxation imposed under the authority of the legislature by the municipalities for municipal purposes. We would go to pieces altogether if that were not so." And Lord Watson shortly afterwards said: "You construe it very reasonably as meaning revenue purposes, arising within the province somewhere"; and Mr. Blake replied: "Yes, I have no doubt about that, and I do not raise any point about it."

[2] L.R. 6 P.C. 272, 1 Cart. 95, (1875).

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No. 2 of section 92 of the British North America Act only authorizes direct taxation incident on the whole province for the general purposes of the whole province, the Privy Council say: [1] "Their lordships see no ground for giving so limited a construction to this clause of the statute. They think it must be taken to enable the provincial legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province."[2] In the recent Brewers and Maltsters Association case,[3] above referred to, their lordships confined their judgment to the question of the validity of the specific enactment before them, under which the license fee imposed was expressed to be 'in order to raise a revenue for provincial purposes,' and held it valid as direct taxation under No. 2 of section 92; but did not answer the more academic question submitted to them as to whether the provincial legislature could so tax not only in order to raise a revenue for provincial purposes, but also "for any other object within provincial jurisdiction," further than to give utterance to a dictum in reference to No. 9 of section 92, which will be referred to in connection with what has now to be said in respect to that clause.

Tax to subsidise a railway

The Brewers and Maltsters case.

No. 9 of section 92, assigns to provincial legislatures the exclusive power of making laws in relation to 'shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes,' and up to a recent date it has been very generally supposed that

[1] L.R. 6 P.C. at p. 282, 1 Cart. at p. 107.

[2] Mr. Clement observes, in his Law of the Canadian Constitution, at p. 425, that this decision "is sufficient warrant for the whole system of municipal taxation now operative throughout Canada."

[3] [1897] A.C. 231. See *supra* p. 679. As to what is taxation 'within the province' see the notes to Proposition 68.

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such taxation by licenses was indirect taxation, and that the object of this clause was to allow provincial legislatures to tax indirectly in this way, though otherwise confined to direct taxation.[1] In more recent judgments, however, as has been already intimated,[2] the view that such taxation was direct and not indirect found much support, and has now been established, as we have seen, by the Privy Council in the recent Brewers and Maltsters Association case,[3] for although they did not find it necessary positively to decide that the license fee imposed upon brewers and distillers which they were dealing with came within No. 9 of section 92, they did decide that it was a direct tax, and this whether it came within that clause or not. So that the suggestion made in a previous part of this work[4] may be again repeated that the probable explanation of No. 9 is that it was inserted to secure this mode of raising revenue to the provinces, although some doubt might exist as to the direct or indirect character of the taxation. And on the argument in the last mentioned case Lord Herschell is reported as saying: "They may have put in sub-section 9 in order to make certain that a particular kind of things would beyond all question be within taxation powers."[5]

No. 9 of sect. 92 B.N.A. Act.

Relates to direct taxation.

Its probable explanation.

[1] So, *e.g.*, per Wilson, J., in Regina *v.* Taylor, 36 U.C.R. at pp. 195, 201, (1875); per Taschereau, J., in Angers *v.* Queen Insurance Co., 16 C.L.J.N.S. at pp. 201, 205, 1 Cart. at pp. 141, 147; per Richards, C.J., in Severn *v.* The Queen, 2 S.C.R. at p. 88, 1 Cart. at pp. 431-2; per Ritchie, C.J., S.C., 2 S.C.R. at p. 98, 1 Cart. at pp. 441-2; per Strong, J., 2 S.C.R. at pp. 105, 108, 1 Cart. at pp. 448, 452; per Fournier, J., 2 S.C.R. at pp. 123-4, 1 Cart. at pp. 467-8; per Taschereau, J., S.C., 2 S.C.R. at pp. 113-4, 1 Cart. at p. 457.

[2] *Supra* p. 361, n. 2.

[3] [1897] A.C. 231.

[4] *Supra* p. 377, n. 2.

[5] Manuscript transcript of notes of Marten Meredith & Henderson, at p. 55.

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There is also another point which arises as to the construction of No. 9 of section 92, and in respect to which it seems probable that the view long prevalent will soon have to be finally abandoned. It concerns the import of the words 'and other licenses;' and in an early page of this work,[1] the cases have been referred to in which it has been sought to apply the rule of *ejusdem generis* to these concluding general words. Cases the other way, however, are also mentioned there, and some words of the Privy Council in Russell *v.* The Queen[2] referred to as indicating that the Board were not disposed to confine the words by the application of the maxim alluded to. The difficulty of course is to find the *genus* which would embrace the four licenses mentioned, and yet not include all other trades and callings, a difficulty felt and expressed strongly by various members of the Board upon the argument in the recent Brewers and Maltsters Association case;[3] and in their judgment therein they went beyond what was absolutely necessary to dispose of the appeal[4] to say: "their lordships were not satisfied by the argument of the learned counsel for the appellants that the license which the enactment renders necessary," (sc. a license on brewers and distillers to sell wholesale within the province), "is not a license within the meaning of sub-section 9 of section 92. They do not doubt that general words may be restrained to things of the same kind as those

'Other licenses in No. 9 of sect. 92

Need they be *ejusdem generis?*

[1] *Supra* p. 27, n. 1.

[2] 7 App. Cas. at p. 838, 2 Cart. at p. 21, (1882).

[3] [1897] A.C. 231. Thus Lord Herschell is reported as saying: "They clearly could raise revenue by taxing an auctioneer who carries on his calling. Would you say that there is no other person carrying on a calling whom they could tax, although you find following the words 'auctioneers and other licenses.' Whom could they tax? What is the distinction between whom they could tax and whom they could not tax?" Manuscript transcript of Marten Meredith and Henderson's notes, p. 58. See, also, *ibid.* pp. 60, 66.

[4] See *supra* p. 724.

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particularized, but they are unable to see what is the genus which would include 'shop, saloon, tavern, and auctioneer' licenses, and which would exclude brewers and distillers licenses;" and thus they destroy the authority of Severn *v.* The Queen,[1] upon the one point on which, if any, its authority remained unimpaired.[2]

Wholesale licenses.

In this case then of the Brewers and Maltsters Association, as we have seen,[3] the Privy Council held that the license fees imposed by the Ontario Act before them being direct taxation, the Ontario legislature had power to impose them though those affected were wholesale dealers, selling by wholesale being defined by the Act[4] as selling in quantities of not less than five gallon casks or one dozen bottles, etc., the distinction between wholesale and retail trade being treated, as has always been usual in our

[1] 2 S.C.R. 70, 1 Cart. 414.

[2] See *supra* p. 27, n. 1. In addition to the cases there cited, City of Halifax *v.* Western Insurance Co., 6 R. & G. (18 N.S.) 387, (1885), may be referred to, where the provincial legislature was held entitled, under No. 9 of section 92, to require a license for municipal purposes from insurance companies. In the Queen *v.* McDougall, 22 N.S. 462, (1889), Weatherbe, J., refers to this decision as having been affirmed by the Supreme Court of Canada; but on enquiry from the Registrar it appears the case never came before that Court. In Regina *v.* Mee Wah, 3 B.C. 403, (1886), Begbie, C. J., held against the validity of a license fee on wash-houses and laundries, as not being *ejusdem generis* with those specified in No. 9 of section 92. In regard to legislation affecting the liquor trade, the line of distinction between enactments looking to the raising of revenue by taxation, and those looking to the regulation of such trade for police and municipal purposes, has perhaps not always been kept in mind in the cases as clearly as it might with advantage have been. In Regina *v.* Mee Wah, 3 B.C. 403, at pp. 409-15, Begbie, C. J., held the license there in question not within No. 9 of section 92 at all, because not imposed *bonâ fide* for the sole purpose or even mainly for the purpose of raising a revenue, but for the repression or suppression of Chinese laundries in Victoria. But there would seem no doubt of the provincial power to prohibit Chinese laundries. See *supra* pp. 399-401. And cf. *supra* p. 560, n.

No. 9 of sect. 92, B.N.A. Act.

[3] *Supra* pp. 718-20.

[4] R.S.O. c. 194, s. 2, subs. 4.

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statutes and judicial utterances, as depending on the quantity sold.[1] Thus they lend additional confirmation to the dictum of Townshend, J., in The Queen *v.* McDougall,[2] that:—"The distinction between wholesale and retail so far as making it a test of the respective powers of the two legislatures under the British North America Act has been abandoned."[3]

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That dictum at the time it was uttered rested upon the decision of the Board in the matter

[1] What would seem to be the more essential difference between wholesale and retail trade, namely, that the wholesale merchant supplies the trade, whereas the retailer deals directly with the general public, and whether any line of severance of legislative power can be founded on this distinction, does not appear to have been discussed in any of the cases, except so far as the wholesale merchant in this sense may be identified with the manufacturer, as to whom, in the Liquor Prohibition Appeal, 1895, [1896] A.C. 348, as we have seen, (*supra* p. 657), the Privy Council expressed the opinion that under certain circumstances the provincial legislatures might have power to control his business in the absence of conflicting legislation by the parliament of Canada. They do not hold that the mere fact that he is a wholesale manufacturer and not a retail dealer determines under which legislative jurisdiction he falls.

[2] 22 N.S. at p. 491, (1889).

[3] Cf. also, per Weatherbe, J., S.C. at p. 477; per McDonald, C.J., S.C. at pp. 472-3; per Sedgewick, J., in *In re* Prohibitory Liquor Laws, 24 S.C.R. at pp. 251-2: per King, J., S.C., at p. 262; and per Maclaren, Q.C., *arguendo*, S.C. 24 S.C.R. at p. 180. The distinction had been made such a test in the earlier cases. Thus in Severn *v.* The Queen, 2 S.C.R. 70, 1 Cart. 414, (1878), the majority of the judges held that a tax upon brewers did not come within No. 9 of section 92, whereas, of course, a tax upon retail shop, saloon and tavern keepers did. In this case, moreover, the view was expressed by Strong, J., 2 S.C.R. at pp. 105-6, 1 Cart. at p. 449, and apparently concurred in by Ritchie and Taschereau, J. J., 2 S.C.R. at pp. 100-2, 115, 1 Cart. at pp. 443-6, 458, though a point not necessary to be decided for the disposition of the case, that the wholesale trade in liquor was not a proper subject of police regulation, though the retail trade of course is. See as to this *infra* pp. 728, n. 5, 730, n. 1. Cf., also, as to the supposed quasi-national, rather than municipal, character of the wholesale trade, and as to its being the trade and commerce of the country in some fuller sense than the retail trade, per Richards, C. J., in Slavin *v.* The Village of Orillia, 36 U.C.R. at p. 180, 1 Cart. at p. 707, (1875); per Wilson, J, in Regina *v.* Taylor, 36 U.C.R. at pp. 195-8, (1875); per McDonald, C. J., in The Queen *v.* McDougall, 22 N.S. at pp. 471, 5, 6, (1889); per Ritchie, J., S.C. at p. 488. And see per Boyd, C., in Regina *v.* Halliday, 21 O.A.R. at pp. 44-5, (1893); per

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of the Dominion License Acts, 1883-4,[1] wherein Townshend, J., says[2] that both sides conceded, and the Court concurred with them, that no distinction, in reality, exists between wholesale and retail licenses, and consequently in the power of regulating both by provincial legislatures. The Dominion License Acts there in question, as has been seen in an earlier part of this work,[3] were concerned rather with regulation of the liquor trade, than with raising a revenue by taxation, though license fees were imposed; and whereas the Supreme Court had held their provisions *intra vires* as to wholesale and vessel licenses, while *ultra vires* as to retail licenses, the Privy Council held them *ultra vires* in respect to all the licensing provisions alike. And so Weatherbe, J., in The Queen *v.* McDougall,[4] says of that case: "Though I have paid attention to all that has been said before the Supreme Court of Canada and the Privy Council, I am unable to see that the words 'wholesale and retail' are anything but mere arbitary terms adopted for convenience."[5] Thus, as

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Osler, J. A., S.C., *ibid.* at pp. 47-8; per Ritchie, C.J., in Molson *v.* Lambe, 15 S.C.R. at p. 259, 4 Cart. at p. 339, (1888); per Fournier, J., S.C., 15 S.C.R. at p. 565, 4 Cart. at p. 343; per Dorion, C.J., S.C., M.L.R. 2 Q.B. at p. 403, 4 Cart. at pp. 367-8; The Queen *v.* McDougall, 22 N.S. 462, (1889); Lepine *v.* Laurent, 17 Q.L.R. at p. 236, (1891); Fortier *v.* Lambe, R.J.Q. 5 S.C. 47, 355, 25 S.C.R. 422, (1895).

[1] Cas. Dig. S.C. 509, 4 Cart. 342, n. 2. See *supra* pp. 289-90.

[2] 22 N.S. at p. 495.

[3] *Supra* pp. 403-6.

[4] 22 N.S. at p. 477.

[5] The Dominion License Act, 1883, 46 Vict. c. 30, s. 7, (d), defined wholesale as consisting in sales of over two gallons. In the argument before the Privy Council in this matter of the Dominion Liquor License Acts, Mr. Horace Davey, as he then was, is reported as saying:—"I agree that no logical distinction whatever can be drawn between wholesale and retail licenses,—that there is no logical distinction between regulating the power of a shop-keeper to sell a dozen bottles at a time, and regulating the power of a tavern-keeper to sell

in the Brewers and Maltsters Association case where the main object of the Act before them was to raise a revenue for provincial purposes,[1] so in the matter of the Dominion Liquor License Acts 1883-4, where the object of the legislation was rather regulation of the liquor traffic, the Privy Council finds nothing turns, so far as legislative power is concerned, upon the fact that those affected by the statutory provisions dealt in wholesale quantities, and not in retail quantities. And in the recent Liquor Prohibition Appeal, 1895,[2] they, in like manner, draw no distinction whatever between the sellers of liquors in wholesale quantities, and other sellers, and say of the Canada Temperance Act, 1886:—"They draw an arbitrary line at eight gallons in the case of beer, and at ten gallons in the case of other intoxicating

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one bottle at a time, or half a bottle, or a pint. 'Wholesale licenses' may be a convenient expression in the Act, but it is really retail trade." Whereupon the following took place:

Sir Montague Smith: "Whether he sells one bottle or twelve he is selling by retail."

Mr. Davey: "Yes, and there is no logical distinction between the two. It is a different kind of retail trade."

Sir Montague Smith: "It is a convenient phrase to express the meaning instead of repeating every time the number of bottles:" Printed transcript from Marten & Meredith's shorthand notes at p. 137. A little later on Mr. Davey says: "I entirely accept and agree with what was so forcibly put by my friend, Sir Farrer Herschell, that the Dominion parliament cannot arrogate to itself the power and give itself jurisdiction by giving its own definition to 'wholesale,' and that you must look really to the substance of the matter:" *ibid.* at p. 138. See, also, *ibid.* at pp. 90-1; and see per Townshend, J., in the Queen *v.* McDougall, 22 N.S. at p. 496. In *In re* Prohibitory Liquor Laws, 24 S.C.R. at p. 204, (1895), Strong, J., says: "I do not think any statutory definition of the terms 'wholesale' and 'retail' is requisite, but if legislation is required for such purpose, it is vested in the Dominion as appertaining to the regulation of trade and commerce." In Regina *v.* Halliday, 21 O.A.R. at p. 44, (1893), Boyd, C., says that the regulation of the liquor traffic, both wholesale and retail, must now be considered to be a matter of provincial competence. See an article on Legislation and Liquor Dealers, 32 C.L.J. at pp. 439-42; also, some remarks in 5 C.L.T. at pp. 161-3.

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[1][1897] A.C. 231.

[2][1896] A.C. 348, at pp. 367-8.

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liquors, with the view of discriminating between wholesale and retail transactions."[1]

Powers of taxation.

Returning to the general subject under discussion of provincial powers of taxation, No. 2 and No. 9 of section 92 of the British North America Act, are, as has been already stated, the only clauses in the Act, excepting section 124 concerning New Brunswick lumber dues,[2] which give express powers of taxation to provincial legislatures, and both of them relate to direct taxation. If then the provinces have any powers at all of indirect taxation, a question which it is proposed presently to consider, it can only be such indirect taxation as is of 'a merely local

[1]There is nothing in this at variance with the previous decision of the Ontario Court of Appeal in *Re* Local Option Act, 18 O.A.R. 572, (1891). All that was there decided was that on the proper construction of the Ontario enactment in question, the prohibition contemplated was one of sale by retail only, and that this was *intra vires*. The Court, however, rested this on No. 8 of section 92, as to which see *supra* p. 398, n. 2. Since the Privy Council decision in the matter of the Dominion Liquor License Acts, it has been unanimously held by the Supreme Court in O'Danaher *v.* Peters and O'Regan *v.* Peters, 17 S.C.R. 44, 4 Cart. 425, (1889), that the New Brunswick Liquor License Act, 1887, was *intra vires* in imposing the necessity of taking out a license on wholesale sellers of liquor. No mention is made of No. 9 of section 92 of the British North America Act, and it would seem that the Act was viewed in the light rather of police regulation. Taschereau, J. there remarks: "Whether he sold wholesale or retail is immaterial, it is not because he sold a large quantity that he can claim to have the action against him dismissed." And Patterson, J., says: "The power of the local legislatures to provide for the issuing of licenses for the sale of spirituous liquors, either in large or small quantities, to limit the number of licenses, and to prohibit, under penalties, the sale of such liquors without a license, cannot now be treated as an open question." It would seem, therefore, that as under the American decisions cited by Ritchie, E.J., in Keefe *v.* McLennan, 2 R. & C. at p. 12, 2 Cart. at p. 410, so in Canada, the power of police regulation extends to wholesale trade, though in Severn *v.* The Queen, 2 S.C.R. at pp. 105-6, 1 Cart. at p. 449, Strong, J., had expressed an opinion the other way. And see the citations *supra* p. 427, n. 3.

Wholesale licenses.

Sect. 124, B.N.A. Act.

[2]In Attorney-General of Quebec *v.* Reed, 26 L.C.J. at p. 355, 3 Cart. at p. 216, (1882), Dorion, C.J., points out that the right thus reserved to New Brunswick by section 124 to collect existing lumber dues, coupled, however, with the condition that they should not be increased, is an exception to the general rule that provincial legislatures have no power of indirect taxation. See as to it, further, Debates on Confederation, at p. 377.

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or private nature in the province,' within the meaning of No. 16, or such indirect taxation as is incidental to the exercise of the other express powers conferred by section 92. And moreover, any such provincial power of indirect taxation is obviously immensely restricted by section 121, which provides that 'all articles of the growth, produce or manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces', and by section 122 which places customs and excise laws under the Dominion jurisdiction. Thus these two sections place beyond provincial control the main field of indirect taxation, and speaking generally it may therefore be, without doubt, correctly said that the provinces are confined to direct taxation. And it would seem in this general sense that the Privy Council were speaking when they said in Bank of Toronto *v.* Lambe,[1] referring to the provinces: "There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion." And so also in St. Catharines Milling and Lumber Co. *v.* The Queen,[2] where

Powers of taxation.

[1] 12 App. Cas. at p. 586, 4 Cart. at p. 22 (1887). Cf. per Wurtele, J., in Lamonde *v.* Lavergne, R.J.Q., 3 Q.B. at p. 314, (1894):— "The Confederation Act, by the second paragraph of section 91, places the regulation of trade and commerce under the exclusive control of the parliament of the Dominion, and when we remember that the bulk of indirect taxes consists in customs and excise duties, the reason for the provision which restricts the taxing powers of the provincial legislatures to direct taxation, becomes apparent. The imposition of taxes by the provincial legislatures on commodities might interfere with the movement of trade between the various provinces of the Dominion and seriously obstruct commercial transactions, and might affect indirectly the provisions made by the Parliament for the regulation of trade and commerce. It would seem therefore that the purpose of the restriction is to prevent the occurrence of such a state of things."

[2] 14 App. Cas. at p. 57,4 Cart. at p. 121, (1888). Cf. also Dow *v.* Black, L.R. 6 P.C. at p. 282, 1 Cart. at p. 108, (1875), as to which see *infra* pp. 739-40. So likewise in Severn *v.* The Queen, 2 S.C.R. 70, 1 Cart. 414, (1878), some of the Supreme Court judges speak as though provincial

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they speak as though the provincial legislatures could raise a revenue only by direct taxation.

But it does not seem to follow that the provincial legislatures may not have a limited power to inpose indirect taxation, either under No. 16 of section 92, in which case it would have to be imposed under such circumstances and conditions as to make its imposition a merely local matter in the province;[1] or as incidental to one of their other express powers. Some of these seem to forcibly suggest taxation, as No. 4, 'the payment of provincial officers,'—No. 6, 'the maintenance' of public and reformatory prisons in and for the province,'—No. 7, 'the maintenance' of hospitals, etc.,—No. 14, 'the maintenance' of provincial courts; and there is not a word in them to limit such taxation to direct taxation.

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The only decision on the point would seem to be that of the Quebec Court of Queen's Bench in Bank of

legislatures are confined to direct taxation: 2 S.C.R. at pp. 108, 123, 138, 1 Cart. 452, 467, 483; and so, per Wurtele, J., in Lamonde *v.* Lavergne, R.J.Q. 3 Q.B. 303, (1894), at p. 311; per Lacoste, C.J., S.C. at p. 304; and the report of Sir John Thompson, as Minister of Justice, of January 28th, 1889: Hodgins' Provincial Legislation, 2nd ed., at p. 581. It would certainly seem as though the founders of Confederation supposed that the provincial legislatures would, in the matter of taxation, be confined to direct taxation and the licenses under No. 9 of section 92, which, as has been seen, (*supra* pp. 723-4), themselves constitute direct taxation. Cf. the speech of the Hon. A. T. Galt in the Debates on Confederation, p. 68. And cf. per Taschereau, J., in Angers *v.* The Queen Insurance Co., 16 C.L.J.N.S. at pp. 201-3, 1 Cart. at pp. 145-7, (1877); per Dorion, C.J., Bank of Toronto *v.* Lambe, M.L.R. 1 Q.B. at pp. 136-8, 4 Cart. at pp. 35-6. So also when the British North America Bill was before the British Parliament, Lord Carnarvon in the House of Lords and Mr. Cardwell in the House of Commons both spoke as though the only provincial power of taxation was to be that of direct taxation: Hans. 3rd ser., Vol. 185, at pp. 564, 1179. But as to these debates being no authority on the interpretation of the Act, see per Ramsay, J., in Bank of Toronto *v.* Lambe, M.L.R. 1 Q.B. at p. 186, 4 Cart. at p. 77; per Moss, J.A., in Smiles *v.* Belford, 1 O.A.R. at p. 450; per Burton, J.A., S.C. at p. 445, who, however, merely says that "at any rate little or no weight can be attached to them."

Debates before Confederation.

[1] See the words of the Privy Council in the Liquor Prohibition Appeal, 1895, [1896] A.C. at p. 371, quoted *supra* p. 657.

Toronto *v.* Lambe,[1] where after deciding that the taxes there in question were direct taxes, the Court, as would appear from the report, went beyond what was necessary to add a clause in the formal judgment that, even assuming they were not direct taxes, the legislature had power to impose the same, inasmuch as the said taxes were 'matters of a merely local or private nature in the province.' And as will presently be seen there are more judicial dicta in favour of the provinces having this limited power of indirect taxation than against it; and the Privy Council certainly seem to countenance the claim, at all events under No. 14 of section 92, in Attorney-General of Quebec *v.* Reed,[2] where after deciding that a Quebec Act imposing a stamp duty of ten cents upon every exhibit filed in Court, the fund so created to be applied as part of the general revenue of the province, was *ultra vires* as indirect taxation, they add[3]:—"One of the things which are to be within the powers of the provincial legislatures—within their exclusive powers—is the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, and including the procedure in civil matters in the Courts. Now it is not necessary for their lordships to determine whether, if a special fund had been created by a provincial Act for the maintenance of the administration of justice in the provincial Courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been appli-

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No. 14 of sect. 92, B.N.A. Act.

[1] M.L.R. 1 Q.B. 122, 199, 4 Cart. 24, 90, (1885).

[2] 10 App. Cas. 141, 3 Cart. 190, (1884).

[3] 10 App. Cas. at pp. 144-5, 3 Cart. at pp. 194-5.

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cable. That may be an important question which will be considered in any case in which it may arise; but it does not arise in this case. This Act does not relate to the administration of justice in the province; it does not provide in any way, directly or indirectly, for the maintenance of the provincial Courts; it does not purport to be made under that power, or for the performance of that duty. The subject of taxation, indeed, is a matter of procedure in the provincial Courts, but that is all. The fund to be raised by that taxation is carried to the purposes mentioned in the second sub-section," (sc. of section 92, of the British North America Act); "it is made part of the general consolidated revenue of the province. It, therefore, is precisely within the words 'taxation in order to the raising of a revenue for provincial purposes.' If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more specially applicable for the administration of justice than any other part of the general provincial revenue. Their lordships, therefore, think that it cannot be justified under the 14th sub-section."[1]

Attorney-General of Quebec *v.* Reed.

Indirect taxation by law stamps.

[1]It is clear from this passage that Gwynne, J., is mistaken when he says, (S.C., 8 S.C.R. at p. 433, 3 Cart. at p. 210):—"The judgment of the Privy Council in The Attorney-General of Quebec *v.* The Queen Insurance Co., 3 App. Cas. 1090, 1 Cart. 117, in effect decides that the provincial legislatures cannot by any Act of theirs, authorise the raising a revenue by any mode of taxation other than direct." See *supra* pp. 713-4, and *infra* p. 736. But notwithstanding these words of the Privy Council, the Manitoba Court of Queen's Bench decided in Dulmage *v.* Douglas, 4 M.R. 495, (1887), over-ruling the decision of Dubuc, J., 3 M.R. 562, that a provincial Act, 49 Vict., c. 50, imposing taxation by law stamps in order to provide for the maintenance of the administration of justice in the Courts, and of the Court houses and goals in Manitoba, and providing that the proceeds of the sale of the law stamps by the provincial treasurer, should pass, not into the general revenue of the province, but should form a special fund, to be respectively called "The Administration of Justice Fund," and "The Building Fund," was nevertheless *ultra vires*. The Court held that 'maintenance' in No. 14 of section 92 does not warrant such indirect taxa-

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Now it will be seen that the Privy Council in this case make no mention of No. 16 of section 92, as possibly authorizing indirect taxation in certain cases. And yet, as has been seen in a former part of this work,[1] a subject matter of legislation may be of a 'merely local or private nature in the province,' within the meaning of that clause, and yet may extend in its operation over the whole province. Therefore if in any case indirect taxation were justifiable under this clause it would, it is submitted, be no objection to it that the proceeds of such taxation were to be applied as part of the general revenue of the province. But on the other hand to come within No. 16, the taxation would have to be of such a character as to be a matter of merely local or private nature, in which the people of the province alone have an interest[2]; and it might well be argued that a tax upon legal proceedings in a province was a matter in which the whole Dominion was interested, as the residents of all the other provinces might have at times to resort to the Courts of the province imposing the taxation. However it does not appear from the abbreviated argument as reported in Vol. 10 of Appeal Cases,[3] that the question of whether the taxation in question was supportable under No. 16 was at all raised before their lordships. For these reasons it would not seem that the judgment in Attorney-General of Quebec *v.* Reed can be properly

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tion, but means "maintenance in such manner and by the exercise of such powers as are within the scope of the authority of the legislature," and so must be by direct taxes or licenses, which it regarded as an exceptional form of indirect taxation allowed to the province. But see *supra* pp. 723-4. See also, *supra* pp. 417, n. 2, 482, and the report of the Minister of Justice of November 2nd, 1895: Hodgins' Provincial Legislation, 2nd ed., pp. 244a, 244b.

[1] *Supra* pp. 651-5.

[2] *Supra* pp. 655-61.

[3] There does not appear to be a verbatim report of this argument.

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considered as deciding anything for or against the right of the provinces to impose indirect taxation in certain cases under No. 16 of section 92[1]; nor can the previous judgment in Attorney-General of Quebec *v.* Queen Insurance Co.,[2] where in like manner no attempt appears to have been made to support the tax under any other clauses of section 92 than Nos. 2 and 9.

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However in Attorney-General of Quebec *v.* Queen Insurance Co., in the Supreme Court of Canada,[3] Gwynne, J., holds against any right whatever of indirect taxation being possessed by the provinces, firstly, on the ground that No. 2 of section 92, while it authorizes the provincial legislatures to make laws in order to the raising of a revenue for provincial purposes by taxation, limits the exercise of the authority thus conferred to direct taxation, and thus, in his judgment, "very clearly excludes the power of raising a revenue by any species of taxation other than direct;"[4] and, secondly, because, "this implied power of raising revenue by indirect taxation, which it is contended the legislatures have, being exercised, as it might be if they have the power, to raise sufficient revenue to defray all the expenses of the government and legislatures in respect of all the several matters under their control and jurisdiction,

[1] Nor do the words of the Privy Council in reference to this clause, quoted *supra* p. 652, from their recent judgment on the Liquor Prohibition Appeal, 1895, [1896] A.C. at p. 365, appear to affect this question. And see Dow *v.* Black, L.R. 6 P.C. 272, 1 Cart. 95, (1875), as referred to *infra* pp. 739-40.

[2] 3 App. Cas. 1090, 1 Cart. 117, (1878).

[3] 8 S.C.R. at pp. 431-3, 3 Cart. at pp. 208-10, (1883), sub nom. Reed *v* Mousseau.

[4] And so per Jetté, J., in Bank of Toronto *v.* Lambe, M.L.R. 1 S.C. at p. 42, 4 Cart. at p. 98.

it would be quite unnecessary for them to exercise the power conferred by item 2, raising by direct taxation a revenue for provincial purposes, or to draw upon the revenue created by the subsidy paid by the Dominion or by sale of the public property, or other income arising therefrom, or from the assets assigned to each province. Such a contention appears to me to involve so palpable a *reductio ad absurdum* as to carry with it its own refutation."[1] Prop. 66

With deference, this second argument is not a strong one, for the intention of the Act may well have been, it is submitted, while giving the provinces a general power of direct taxation, and the other sources of revenue referred to, to leave to them also such powers of indirect taxation as they might, without interfering with customs and excise, or infringing section 121,[2] appropriately exercise under their other express powers. But the first ground of objection may be supplemented by the words of Dorion, C. J., in Bank of Toronto *v.* Lambe,[3] so far at least as concerns No. 16 of section 92 :—"One of the most elementary rules of interpretation of statutes is that general provisions in an Act of parliament do not control nor affect the special enactments which it contains, and therefore the general authority conferred by sub-section 16 as to matters of a purely local or private nature in the province can only apply to such other matters as are not specially provided for by the Act, and as the subject of provincial Provincial indirect taxation.

[1] Cf. per Taylor, J., in Dulmage *v.* Douglas, 4 M.R. at p. 498, (1887), *supra* p. 482.

[2] See *supra* p. 731.

[3] M.L.R. 1 Q.B. at p. 136, 4 Cart. at p. 35, (1885). However see per Dorion, C. J., in Attorney-General *v.* Reed, 26 L.C.J. at p. 355, 3 Cart. at p. 216, (1882). See, also, *supra* p. 26, n. 1.

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taxation is specially provided for by sub-sections 2 and 9 of section 92, sub-section 16 does not apply to the subject of taxation." But this, it is obvious, would be much stronger if, as was until lately generally supposed, No. 9 related to a mode of indirect taxation. But, as has been seen,[1] it too is direct taxation; so that all that is expressly referred to by Nos. 2 and 9 is direct taxation, and there is no express reference to indirect taxation in section 92 one way or the other. However, Dorion, C. J., goes on to say: "If sub-section 16 was not limited by the preceding sub-sections 2 and 9 these sub-sections would have been quite unnecessary, since sub-section 16, by the generality of its terms, would have covered all subjects over which the provincial legislatures could have exercised their legislative authority.[2]

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In the same case, however, Ramsay, J., also discusses the matter[3] observing that *inclusio unius, exclusio alterius*, is one of the feeblest of the rules of interpretation, if it can be called a rule at all; that words that are, strictly speaking, unnecessary, may be used *ex majore cautelâ*; that the right to tax the person might have been questioned with much greater force than the right to tax indirectly if nothing had been said; that there is no express exclusion of the general power to tax, which seems to be an inherent right of government; that on the arguments advanced to prove Nos. 2 and 9 to be impliedly a dealing with the whole question of the

[1] *Supra* pp. 723-4.

[2] See, also, *supra* pp. 482-3. For other *dicta* adverse to the right of provincial legislatures to impose indirect taxation, see per Mackay, J., in Attorney-General of Quebec *v.* Reed, 3 Cart. at p. 229, (1882); per Begbie, C. J., in Regina *v.* Mee Wah, 3 B.C. at p. 404, (1886). And see *supra* p. 732, n.

[3] M.L.R. 1 Q.B. at pp. 184-5, 4 Cart. at pp. 75-7.

taxing power, the local legislatures could not legislate as to shops, saloons, or taverns at all, except in regard to licences in order to raise a revenue; and, later on, he says[1]: "On the main question, as to whether there is any other power to tax, except by way of license, than that set forth in sub-section 2, the case of Dow *v.* Black,[2] seems to furnish direct authority. Sir James Colvile in pronouncing the judgment of the Privy Council said[3]: 'Their lordships are further of opinion with Mr. Justice Fisher,[4] the dissentient judge in the Supreme Court, that the Act in question, even if it did not fall within the second article of section 92, would clearly be a law relating to a matter of a merely local or private nature within the meaning of the 9th article of section 92 of the Imperial statute.' It is evident the learned judge meant the 16th article of section 92, for he had just declared that article 9 had obviously no bearing on the present question. . . It seems to me then that it is safe to say that Dow *v.* Black lays down the principle as formally as it can

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Provincial indirect taxation.

Dow *v.* Black.

[1] M.L.R. 1 Q.B. at p. 192, 4 Cart. at pp. 83-4.

[2] L.R. 6 P.C. 272, 1 Cart. 95, (1875).

[3] L.R. 6 P.C. at p. 282, 1 Cart. at p. 108.

[4] The provincial Act in question in Dow *v.* Black, was one empowering the majority of the inhabitants of the Parish of St. Stephen, in New Brunswick, to raise, by local taxation, a subsidy designed to promote the construction of a certain railway extending beyond the limits of the province into the State of Maine, but already authorized by statute prior to Confederation. The Judicial Committee held the Act valid as direct taxation under No. 2 of section 92 of the British North America Act, as we have seen *supra* pp. 722-3. The Supreme Court of New Brunswick had held the Act *ultra vires* on the ground that it was legislation in relation to a local work or undertaking, extending beyond the limits of the province, within No. 10 (a) of section 92, with which view of the nature of the Act the Privy Council did not agree. Fisher, J., in a dissenting judgment held, first, that the Act was not within No. 10 (a) at all, for that that referred to extension into another province of the Dominion, not to extension into a foreign country, and secondly, that it came within the general authority to tax for local purposes, comprised within the category of powers provided for in No. 16 of section 92, being purely a matter of a local nature.

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be laid down, (barring only the slip as to the number of the sub-section), that sub-sections 2 and 9 do not exclude from the powers of the local legislatures the right to propose other forms of taxation." And other judges who gave judgment in these cases of Bank of Toronto *v.* Lambe, and Attorney General of Quebec *v.* Reed, expressed views on the whole favourable to the provincial power of imposing indirect taxes under No. 16 of section 92, or as incidental to some of the other of their express powers under that section.[1]

Provincial indirect taxation.

And it is, it is submitted, more consistent with the plenary nature of the powers of provincial legislatures under the British North America Act[2] that they should be held to have this right, than that it should be denied to them. And so Ramsay, J., says in Bank of Toronto *v.* Lambe[3]: "It would seem beyond question that this (British North America) Act attributes plenary governmental powers with regard to certain matters to both the federal and local bodies, and so far as I know this has never been doubted. We have, therefore, one point settled. The local organizations are governments. They enjoy regalian powers, and all the incidents of such powers; and these powers have not been limited by the charter, which, although it has specially passed on the taxing power, has been

[1] So per Baby, J., in Bank of Toronto *v.* Lambe, M.L.R. 1 Q.B. at pp. 197-9, 4 Cart. at pp. 88-90; per Strong, J., in Attorney-General of Quebec *v.* Reed, 8 S.C.R. at p. 419, 3 Cart. at p. 199; per Henry, J., S.C., 8 S.C.R. at p. 424, 3 Cart. at p. 203; per Taschereau, J., S.C., 8 S.C.R. at p. 427, 3 Cart. at p. 206; per Dorion, C. J., S.C., 26 L C.J. at p. 355, 3 Cart. at p. 216; per Cross, J., S.C., 26 L.C.J. at p. 361, 3 Cart. at p. 224. Cf. also per Ritchie, C.J., S.C., 8 S.C.R. at at p. 417, 3 Cart. at p. 198.

[2] See Proposition 17 and the notes thereto.

[3] M.L.R. 1 Q.B. at p. 188, 4 Cart. at p. 80.

silent as to the powers of indirect taxation."[1] No doubt the matter may some day become one of great importance, though perhaps the same learned judge may have taken an exaggerated estimate of it, when he said in Attorney-General of Quebec *v.* Reed[2]: "As soon as the Privy Council lays down as a proposition of law, the issue being clearly before them, that the local governments have no power to tax otherwise than by licenses and by direct taxation, and that direct taxation means certain taxes, and no more, then I shall accept the decision as conclusive, and conform my judgments to it, although I know that its effect must be to break up Confederation." Prop. 66

Provincial indirect taxation.

Returning to the leading Proposition it should be pointed out before concluding, that apart from law-making powers, provincial legislatures have doubtless, by virtue of being legislative bodies at all, such powers and privileges as are necessarily inherent in and incident to such bodies; and having them, may regulate their exercise by statute or standing rules if they see fit so to do.[3] Thus in *ex parte* Dansereau,[4] the Court of Queen's Bench at Montreal, decided that the provincial legislatures have the right to

[1] It was at one time thought that under No. 8 of section 92 of the British North America Act, 'municipal institutions in the province,' the legislatures would have certain rights of indirect taxation, *e.g.* per Wilson, J., in Regina *v.* Taylor, 36 U.C.R. at pp. 195, 201, (1875). But as to No. 8 of section 92, see now *supra* p. 398, n. 1.

[2] 26 L.J.C. at p. 358, 3 Cart. at p. 220, (1882).

[3] Reference may be made on this subject to Todd's Parliamentary Government in the British Colonies, 2nd ed., p. 687 *et seq.*; 'Are legislatures parliaments? a Study and Review,' by Fennings Taylor, Deputy Clerk and Clerk Assistant to the Senate of Canada: John Lovell, Montreal, 1879; a review of the last named work, in the Canadian Monthly, vol 3, p. 345, and two articles by S. J. Watson, entitled 'The Powers of Canadian Legislatures': *ibid.* at pp. 519, 561.

[4] 19 L.C.J. 210, 2 Cart. 165, (1875). See, as to this case, also *supra* pp. 69, 452, n.

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summon witnessess, and to punish persons who disobey such summons, on the ground that such right was a necessary incident of the powers of legislatures and of the administration of public affairs; and that the provincial Act, 33 Vict, c. 5, regulating this matter was valid.

Inherent powers of legislatures

The Judicial Committee of the Privy Council have in several judgments recognized the existence of such inherent powers in colonial legislatures, though the actual case of a Canadian legislature under the British North America Act exercising them does not seem yet to have come before the Board. In Doyle *v.* Falconer,[1] however, they say of the Legislative Assembly of the Island of Dominica, constituted under Royal Proclamation and Commissions, —"As it must be conceded that the common law sanctions the exercise of the prerogative by which the Assembly has been created, the principle of the common law, which is embodied in the maxim, *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest* applies to the body so created," and that the only question was whether the power to punish and commit for contempts committed in its presence, with which they were there concerned, was one "necessary to the existence of such a body as the Assembly of Dominica, and the proper exercise of the functions which it is intended to execute".[2] And they decided that the Assembly did not possess the power of punishing a contempt, even though committed in its presence there being a distinction between the power to punish a contempt, which is a judicial power, and

Doyle *v.* Falconer.

Punishment for contempt.

[1] L.R. 1 P.C. 328, (1866).

[2] L.R. 1 P.C. at p. 340.

a power to remove any obstruction offered to the deliberations or proper action of the legislative body during its sittings, which last power is necessary to self-preservation. Prop. 66

And on the authority of this case of Doyle *v.* Falconer, it was decided by the Supreme Court in Landers *v.* Woodworth,[1] (where the subject of the powers and privileges of the present provincial legislatures apart from the general law-making powers conferred by sections 92 and 93 of the British North America Act, is elaborately discussed), that the Legislative Assembly of Nova Scotia has, in the absence of express grant, no power to remove one of its members for contempt, unless actually obstructing the business of the House, and therefore had no right forcibly to remove the member in question from his seat in the House, merely because having made in the House certain serious charges against the Provincial Secretary, which, after enquiry before a Committee were adjudged unfounded, he refused to repeat in the House the form of apology required from him. Taschereau, J., admitted himself bound by the decision in Doyle *v.* Falconer,[2] but stated[3] that the result amounted to a declaration that all the decisions in the province of Quebec for the last seventy years on the subject were against law. Landers *v.* Woodworth. Contempt of the House.

And in the subsequent case of Barton *v.* Taylor,[4] the Privy Council approved and followed their prior

[1] 2 S.C.R. at p. 158, (1878). See, also, as to this case, *supra* pp. 68-9.

[2] L.R. 1 P.C. 328, (1866).

[3] 2 S.C.R. at pp. 205-6, 208.

[4] 11 App. Cas. 197, (1886). Specially referred to in Fielding *v.* Thomas, [1896] A.C. at pp. 612-3 presently to be further noticed. The case is reported in the Court below, 6 N.S.W. 1, 7 N.S.W. 30.

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decision in Doyle *v.* Falconer, in relation to the Legislative Assembly of New South Wales. They there lay it down, in like manner, that the powers incident to or inherent in a colonial Legislative Assembly, which, they say, [1]"undoubtedly exist," are in the words of Kielley *v.* Carson,[2] "such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute"; and add: "Whatever in a reasonable sense, is necessary for these purposes is impliedly granted whenever any such legislative body is established by competent authority. For these purposes protective and self-defensive powers only, and not punitive are necessary." And they held that, though some power of suspending members guilty of obstruction or disorderly conduct was "reasonably necessary for the proper exercise of the functions of any Legislative Assembly of this kind," a power of unconditional suspension for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself, was not. This, they held, "is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse."

Barton *v.* Taylor.

Suspension of members.

But, at the same time, in Doyle *v.* Falconer,[3] their lordships say:—"The privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot, therefore, be inferred from the

[1] 11 App. Cas. at p. 203.

[2] 4 Moo. P.C. 63, at p. 88, q v., a case of the Newfoundland legislature.

[3] L.R. 1 P.C. at p. 339, (1866).

possession of certain powers by the House of Commons, by virtue of that ancient usage and prescription, that the like powers belong to Legislative Assemblies of comparatively recent creation in the dependencies of the Crown.[1] Again there is no resemblance between a colonial House of Assembly, being a body which has no judicial functions, and a Court of justice, being a Court of Record.[2] There is, therefore, no ground for saying that the power of punishing for contempt, because it is admitted to be inherent in the one, must be taken by analogy to be inherent in the other."[3]

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Lex et consuetudo Parliamenti.

[1] And as to the *lex et consuetudo Parliamenti* not applying to colonial legislatures, see further per Pollock, C.B., in Fenton *v.* Hampton, 11 Moo. P.C. 347, at p. 397, (1858); per Dorion, C.J., in Ex parte Dansereau, 19 L.C.J., at p. 232, 2 Cart. at p. 191 ,(1875); per Ritchie, J., in Landers *v.* Woodworth, 2 S.C.R. at pp. 201-2, (1878); Norton *v.* Crick, 15 N.S.W., L.R., 172, (1894). "As far back as 1704, it was resolved and agreed by the House of Lords and House of Commons, that neither Houses of Parliament have power, by any vote or declaration, to create to themselves new privileges, not warranted by the known laws and customs of Parliament. The *lex et consuetudo Parliamenti*, by all the late decisions, have limits. They cannot be added to, and new cases of privilege adjudged, even by the House of Commons of England": per Henry, J., in Landers *v.* Woodworth, 2 S.C.R. at p. 209.

[2] "In America the authority of legislative bodies in this regard," (sc. power to punish for contempt), "is much less extensive than in England, and we are in danger, perhaps, of being misled by English precedents. The Parliament, before its separation into two bodies, was a High Court of judicature, possessed of the general power, incicent to such a Court, of punishing contempts; and after the separation, the power remained with each body; therefore each was considered to be a Court of judicature and exercised the functions of such a Court. American legislative bodies have not been clothed with the judicial function, and they do not therefore possess the general power to punish for contempt; but, as incidental to their legislative authority they have the power to punish as contempts the acts of members or others which tend to obstruct the performance of legislative duty, or to defeat, impede, or embarrass the exercise of legislative power": Cooley's Constitutional Limitations, 6th ed., pp. 159-60. Cf. also Story on the Constitution of the United States, 5th ed., Vol. 1, p. 612, *et seq.*

American legislatures.

[3] On this subject the following Australian cases may be mentioned. In The Queen *v.* MacPherson, 7 N.S.W., 230, (1868), an indictment for an assault committed by one member upon another in an ante-chamber of the House of Assembly 'in contempt of the Legislative Assembly,' and 'to the great obstruction of its business' was successfully demurred to by the defendant, though this decision was over-ruled by the Judicial

Australian cases.

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However, the practical importance of this subject does not seem very great so far as Canadian legislatures are concerned, for in the recent case of Fielding *v.* Thomas,[1] the Privy Council have decided

No. 1, sect. 92, B.N.A. Act.

that No. 1 of section 92 of the British North America Act, whereby provincial legislatures may exclusively make laws in relation to 'the amendment from time to time, notwithstanding anything in this Act, of the Constitution of the province, except as regards the office of Lieutenant-Governor,'[2] confers

Amendment of the Constitution.

the power "to pass Acts for defining the powers and privileges of the provincial legislature." "It surely cannot be contended," they say, "that the independence of the provincial legislature from outside interference, its protection, and the protection of its members from insult while in the discharge of their duties, are not matters which may be classed as part of the Constitution of the province, or that

Fielding *v.* Thomas.

legislation on such matters would not be aptly and properly described as part of the constitutional law

Committee of the Privy Council, on the ground, however, that a common assault was sufficiently charged: L.R. 3 P.C 268. In *In re* Hugh Glass, 6 W.W. and A.'B.,L.,45, 103, (1869), a warrant of the Legislative Assembly committing for contempt was held bad on habeas corpus, for not stating grounds showing that the powers of the Assembly had not been exceeded; and see S.C. in App., Speaker of Legislative Assembly of Victoria *v.* Glass, L.R. 3 P.C. 560, (1871). See also the

Contempt of the House.

report of Sir. J. Thompson as Minister of Justice, of February 17th, 1894, objecting to a certain Act of Prince Edward Island giving the Legislative Assembly power to commit to jail persons adjudged by resolution of the Assembly guilty of contempt or breach of its privileges: Hodgins' Provincial Legislation, 2nd ed., at pp. 1227-8. But see now Fielding *v.* Thomas *supra*. As to ejecting members guilty of disorderly conduct, see per Henry, J., in Landers *v.* Woodworth, 2 S.C.R. at p. 158, (1878). In Toohey *v.* Melville, 13 N.S.W., L., 132, (1893), it was held that the Speaker or Chairman of the Legislative Assembly has power, without a resolution of the House to eject from the Chamber a member guilty of disorderly conduct and wilful obstruction of the business of Parliament, under Standing Order 176 of the British House of Commons of 1857, adopted by the Legislative Assembly.

[1][1896] A. C. 600, at pp. 610-1.

[2]See as to No. 1 of section 92, *supra* p. 100, n. 2.

of the province."[1] Further, they hold in this case that Nova Scotia, with which they were dealing, would have such power under the Colonial Laws Validity Act, saying as to this: "By section 88," Prop. 66

Fielding *v.* Thomas.

[1] In Ex parte Dansereau, 19 L.C.J. at p. 228, 2 Cart. at p. 183, (1875), Ramsay, J., had held the contrary view, that No. 1 of section 92, does not refer to any such matters, but only to matters dealt with in sections 58-90 of the British North America Act, under the general rubric "Provincial Constitutions;" and so, again, in Cotte's case, 19 L.C.J. at p. 217, 2 Cart. at p. 226. Sanborn, J., however, in Ex parte Dansereau, 19 L.C.J. at p. 237, 2 Cart. at pp. 199-200, expressed the view now upheld by the Privy Council. Cf. per Richards, C.J., in Landers *v.* Woodworth, 2 S.C.R. at pp. 191-2, who says: "The legislators of Ontario and Quebec seem to have conferred on the Houses of Assembly in these provinces extensive powers to enable them effectively to exercise their high functions and discharge the important duties cast on them. It may be necessary still further to extend their powers. The legislatures of the other provinces will probably consider it desirable to take the same course, and in that way unmistakeably place these tribunals in the position of dignity and power which it is desirable they should possess." For such legislation in Ontario, see R.S.O., 1887, c. 11, s. 48. Cf. also Dill *v.* Murphy, 1 Moo. P.C.N.S. 487, (1864), (reported below in the Australian reports, 1 Wyatt & Webb, L., 171), a case referred to at length in Landers *v.* Woodworth, 2 S.C.R. at p. 183. In the course of the argument before the Privy Council in Fielding *v.* Thomas, Lord Watson is reported to have said: "I take it under the power given to the provincial legislature by the statute of 1867, the provincial legislature had the same power to alter and amend its Constitution by its own legislative Act as the Imperial parliament of Great Britain possessed at that date. It could give to itself any power which the parliament of Great Britain could constitutionally have given:" Manuscript transcript from Cock and Kight's shorthand notes, p. 25. For reports of Ministers of Justice prior to Fielding and Thomas, objecting to, and even recommending the disallowance of provincial Acts attempting to define the privileges, immunities and powers of the legislatures of the provinces, see Hodgins' Provincial Legislation, 2nd ed., pp. 83-93, 146-7, 254-5, 495, 531-2, 780, and Dom. Sess. Pap. 1870, Vol. 3, No. 35, pp. 11-23, 39-42; and for the opinion of the law officers of the Crown in England given in 1869, see Hodgins' *ibid.* at pp. 84-5. See, also, Todd's Parliamentary Government in the British Colonies, 2nd ed., p. 523; and a letter signed "An Exile" in 18 C.L.J. at p. 245. It may be incidentally mentioned here that in the Australian case of Stevenson *v.* The Queen, 2 W.W. and A'B., L., 143, (1865), it was held that the Legislative Assembly could not levy customs duties by its own resolution, neither it nor the English House of Commons possessing such a privilege. In Gipps *v.* Malone, 2 N.S.W., L.R., 18, (1881), it was held that no action for defamation will lie upon any question put by a member of a colonial legislature in the course of its proceedings; and in Norton *v.* Crick, 15 N.S.W., L.R., 172, (1894), that a member of the Legislative Assembly was not privileged from arrest under a writ of ca. sa. even though the Assembly be sitting at the time of his arrest.

No. 1, sect. 92, B.N.A. Act.

Amendment of the Constitution.

Privileges and immunities of legislatures.

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(sc. of the British North America Act), "the constitution of the legislature of the province of Nova Scotia was, subject to the provisions of the Act, to continue as it existed at the Union until altered by authority of the Act. It was, therefore, an existing legislature, subject only to the provisions of the Act. By section 5 of the Colonial Laws Validity Act, 28-29 Vict. c. 63, it had at that time full power to make laws respecting its Constitution, powers, and procedure. It is difficult to see how this power was taken away from it, and the power seems sufficient for the purpose."[1] And this would of course apply

The Colonial Laws Validity Act.

[1] Cf. as to this power under the Colonial Laws Validity Act, per Sir J. W. Colvile, in Doyle *v.* Falconer, L.R.1 P.C. at p. 341, (1866). In Fielding *v.* Thomas, [1896], A.C. 600, the Privy Council further hold that section 30 of the provincial Act in question, which enacted that:—'Each House shall be a Court of Record, and shall have all the rights and privileges of a Court of Record for the purpose of summarily inquiring into, and (after the lapse of twenty-four hours) punishing the acts, matters, and things herein declared to be violations or infringements of this chapter,' etc., amongst which were libels upon members of either House during the session of the legislature, and section 31, which prescribed imprisonment for such time during the session of the legislature then being held as might be determined by the House, before which such violation or infringement should be inquired into, were not *ultra vires* as infringing upon the jurisdiction of the Dominion parliament over criminal law, thus over-ruling the view of Graham, E.J., in the Court below, (26 N.S. at p. 74, sub nom. Thomas *v.* Haliburton), noted *supra* pp. 40, n. 1, 176, n. 1. They say:—"It is true that the criminal law is one of the subjects reserved by the British North America Act for the Dominion parliament, but that does not prevent any inquiry into, and the punishment of an interference with the powers conferred upon the provincial legislatures by insult or violence. The legislature had none the less a right to prevent and punish obstruction to the business of legislation because the interference or obstruction was of a character which involved the commission of a criminal offence or brought the offender within reach of the criminal law. Neither in the House of Commons of the United Kingdom nor the Nova Scotia Assembly could a breach of the privileges of either body be regarded as subjects ordinarily included within that department of State government which is known as the criminal law." They added, however: "Their lordships are disposed to think that the House of Assembly could not constitute itself a Court of Record for the trial of criminal offences. But read in the light of the other sections of the Act, and having regard to the subject-matter with which the legislature was dealing, their lordships think that those sections were merely intended to give to the House the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal. If they

Making legislatures Courts of Record with punitive powers.

Criminal law.

The trial of criminal offences.

to the legislature of New Brunswick, also mentioned in section 88, and doubtless to that of Prince Edward Island.[1] Prop. 66

It is to be observed, however, that by section 18 of the British North America Act, the power of the Dominion Parliament in respect to these matters is expressly provided for, and it is enacted: 'The privileges, immunities, and powers, to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the parliament of Canada, but so that the same shall never exceed those at the passing of this Act[2] held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.' In Fielding *v.* Thomas,[3] the Privy Council remark as to this: "It is to be observed that the House of B.N A. Act, sect. 18. Privileges of Dominion parliament.

meant more than that, or if it be taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, section 30 could not be supported." They further held that the provincial legislature had power to provide, as it had done by the Act in question, that members of the House should be relieved from civil liability for acts done and words spoken in the House, whether it could or could not so relieve them from liability to a criminal prosecution. For the report of the acting Minister of Justice refusing to recommend the disallowance of the Nova Scotia Act of 1892 passed to indemnify the Speaker, the Sergeant at Arms and the keeper of the county jail against all liability in connection with the acts complained of in Fielding *v.* Thomas, see Hodgins' Provincial Legislation, 2nd ed., p. 630. Cf. Phillips *v.* Eyre, L R. 6 Q.B. 1, (1870). Acts of indemnity.

[1] See section 10 of the Order in Council dated June 26th, 1873, containing the terms of union of Prince Edward Island: Dominion Statutes, 36 Vict. at p. xxii. British Columbia possessing at the time of entering Confederation, a legislature only in part representative, was not, it would seem, within the terms of section 5 of the Colonial Laws Validity Act.

[2] Amended so as to read "such Act" by Imp. 38-39 Vict. c 38, s. 1.

[3] [1896] A.C. at p. 610.

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Privileges of Dominion parliament.

Commons of Canada was a legislative body created for the first time by the British North America Act, and it may have been thought expedient to make express provision for the privileges, immunities, and powers of the body so created, which was not necessary in the case of the existing legislature of Nova Scotia."[1] And as has been seen, the power of the Dominion parliament in this regard is restricted, while that of the provincial legislatures is not.[2]

[1] See *supra* p. 748. In this case in the Court below, (26 N.S. at p. 59), counsel suggested that it may have been necessary to give this express grant to the parliament of Canada to exercise the same powers as the English House of Commons, because it is dealing with civil rights.

[2] Cf. per Ramsay, J., in Cotte's case, 19 L.C.J. at p. 218, 2 Cart. at p. 226; and per Graham, E.J., in Thomas *v.* Haliburton, 26 N.S. at p. 76, (1893).

PROPOSITION 67.

67. Provincial Legislatures cannot by corresponding legislation in any degree enlarge the scope of their powers.

Conjoint action of the Provinces.

This Proposition is suggested by the words of Ramsay, J., in Dobie *v.* The Temporalities Board,[1] who says: "There is a sort of floating notion that by conjoint action of different legislatures the incapacity of a local legislature to pass an Act may be in some sort extended. I cannot understand anything more clear than this, that the local legislatures by corresponding legislation cannot in any degree enlarge the scope of their powers." Uniformity of legislation on provincial subjects can of course be produced in different provinces by the respective legislatures enacting similar laws, but it is abundantly clear that the sphere of law-making power of each legislature remains identically the same as before.[2]

[1] 3 L. N. at p. 250, 1 Cart. at p. 382.

[2] See *supra* pp. 314-6.

PROPOSITION 68.

68. A Provincial Legislature by virtue of No. 13 of section 92 of the British North America Act has power to make laws in relation to such 'property and civil rights' [within the meaning of that clause as restricted to allow scope for the due operation of the other provisions of the said Act] as have a local position within the Province; but they have no such power in relation to property and civil rights having their local position in another Province; and if, in any case, they cannot legislate in relation to the one, without at the same time legislating in relation to the other, that is a case beyond their powers of legislation altogether.

Dobie *v.* The Temporalities Board.

The above Proposition is suggested, as will presently be seen, by the judgment of the Privy Council in Dobie *v.* The Temporalities Board.[1] But first, as to what is meant by 'property and civil rights' in No. 13 of section 92 of the British North America Act, whereby the provincial legislatures are given the exclusive power of making laws in relation to 'property and civil rights in the province.' In Citizens Insurance Co. *v.* Parsons[2] where it was contended

[1] 7 App. Cas. 136, 1 Cart. 351, (1882).

[2] 7 App. Cas. at pp. 109-11, 1 Cart. at pp. 274-6, (1881).

that 'civil rights' in this clause meant only such rights as flowed from the law, as for example, the status of persons, their lordships say that they "find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words 'civil rights.' The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contracts." And they refer to section 94 of the Act, which they term "the uniformity section," whereby the parliament of Canada is empowered to make provision for the uniformity of any laws relative to 'property and civil rights' in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the Courts in those three provinces, if the provincial legislatures choose to adopt the provisions so made, and point out that:—"The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law, as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces. The words 'property and civil rights' are obviously used in the same sense in this section as in No. 13 of section 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity." Otherwise, they say, "the Dominion parliament could, under its general power[1], legislate in regard to contracts in all and each of the provinces, and, as a consequence of this, the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the Dominion legislature,

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'Property and civil rights in the Province.'

No. 13, sect. 92, B.N.A. Act.

[1]See Proposition 26 and the notes thereto.

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and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act."[1]

'Property and civil rights in the province.'

The Privy Council then refer to section 8 of the Quebec Act, 14 Geo. III., c. 83, which enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada, and be determined agreeably to the said laws, and say: "In this statute the words 'property' and 'civil rights' are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one."[2]

It has been shown, however, in the notes to Pro-

No. 13, sect. 92, B.N.A. Act.

[1] In Dubuc *v.* Vallée, 5 Q.L.R. at p. 37, (1879), Caron, J. says: "Le teste précis et formel de ce paragraphe, c'est a dire les mots droits civils dans la province, ne peuvent signifier autre chose que ces droits civils conférés dans la province de Quebec par notre code civil, ou les droits qui y correspondent dans les autres provinces. Les expressions dans la province ont pour objet de restreindre le sens de la signification des mots droits civils que le précedent à cette espèce de droits qui n'embrassent que les droits privés tels qu'ils sont règlés par notre code civil, lequel, comme on sait, n'affecte pas les droits politiques des citoyens de la Puissance. Il est evident, surtout en ce qui concerne la province de Québec, qui occupé une position exceptionnelle dans la Confédération Canadienne, ainsi qu'on le voit par la section 94 de l'Acte de l'Amerique Britannique du Nord, que le but du legislateur par ce paragraphe 13 était d'empêcher le parliament du Canada de pouvoir modifier en aucune maniere quelconque la faculté d'acquerir ou de transmettre la propriété et le pouvoir de contracter."

[2] In the despatch from the Lieutenant-Governor of Ontario to the Secretary of State, of January 22nd, 1886, on the subject of the power to appoint Queen's Counsel (as to which power see *supra* pp. 87-9, 133-6, 178-9, and In *re* Queen's Counsel, 23 O. A. R. 792, since affirned by the Privy Council, July 30th, 1897), section 8 of the Quebec Act is also referred to, to show the extensive purport of the words 'property and civil rights'; and it is added: "Under the same words, in the Upper Canada Act, 33 George III. c. 1, the whole law of England, except the criminal law (which was the subject of another enactment) was held to be introduced:" Ont. Sess. Pap., 1888, No. 37, at p. 17. See, also, *supra* pp. 18-20.

position 37, (and it is not necessary to repeat here what is there set out), that the interpretation of the clause of section 92 under consideration, must be restricted sufficiently to allow scope for the full exercise of Dominion powers[1]; and it has also been pointed out that an Act may interfere with and affect the use of property, or civil rights, and yet not be legislation in relation to 'property and civil rights in the province' within the meaning of No. 13 of section 92, these not being the primary matters dealt with.[2] Prop. 68

Such, then, being the meaning of 'property and civil rights' in No. 13 of section 92, it remains to consider what is the effect of the limitation 'in the province' in that clause. In the recent Liquor Prohibition Appeal 1895,[3] the Privy Council say:—"A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the prov- 'Property and civil rights in the province.'

[1]See Proposition 37 and the notes thereto, and especially *supra* pp. 433-4; and as to 'property,' Proposition 54 and the notes thereto, *supra* p. 590 *et seq.* In the recent argument in the case of Fielding *v.* Thomas, [1896] A. C. 600, Lord Watson is reported as saying:—"This Board have had to consider in more than one case the overlapping of the classes. For instance, the province has got by the terms of section 92, exclusive power to deal with civil rights. If you are to read that enactment of the sub-section of section 92 in its strictest sense it would exclude the legislative jurisdiction of the Dominion and accordingly we have held here that there is a sort of neutral field, and if the province occupies that and regulates a civil right it may very well be that the parliament of the Dominion may legislate on bankruptcy or on libel in such a way as to over-ride the provincial legislation on the subject, and it may be that whilst the amendment of their own Constitution is conceded to the province they might as an unnecessary incident of amending their Constitution enact some things which might be abrogated by a Canadian law. It does not necessarily follow that they have no jurisdiction:" Manuscript transcript from Cock and Kight's shorthand notes, pp. 29-30. As to Fielding *v.* Thomas, see further *supra* pp. 746-50. Over-lapping powers.

[2]See *supra* pp. 396-7; and Proposition 36 and the notes thereto. See, too, as to laws against gambling, Regina *v.* Keefe, 1 N. W. 1, (No. 2) 86, (1890); Regina *v.* Fleming, 15 C.L.T. 242, (1895).

[3][1896] A.C. at p. 364.

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ince, and does not affect transactions in liquor between persons in the province, and persons in other provinces or in foreign countries, concerns property in the province, which would be the subject matter of the transactions, if they were not prohibited, and also the civil rights of persons in the province"; and they imply that in their opinion such a law might well be authorized by No. 13 of section 92, as a law in relation to property and civil rights in the province. But it would seem to be by reason of the limitation contained in the words 'in the province,' that later on in the same judgment, when alluding to the provision in the Canada Temperance Act 1886, which permits wholesale dealers in liquors to sell for delivery anywhere beyond the district wherein they carry on business, unless such delivery is to be made in an adjoining district where the Act is in force, they say: "If the adjoining district happened to be in a different province, it appears to their lordships to be doubtful whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a provincial legislature." It would seem, especially in the light of the former passage, that their lordships mean that such a legislative restriction, affecting, as it would do, transactions in liquor between persons in the province, and persons in other provinces or in foreign countries, would be legislation in relation to property and civil rights out of the province, as well as in the province, and therefore would not be authorized by No. 13 of section 92.[1]

What are property and civil rights 'in the province'?

[1] At the same time it seems a little hard to understand why a provincial legislature should not have power to enact with regard to any property locally situate in the province, that it shall not be taken out of the province. In Cooley's Constitutional Limitations it is said: "The legislative authority of every State must spend its forces within the territorial

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But what Proposition 68 is intended especially to affirm is that under No 13 of section 92, provincial legislatures may make laws in relation to all such property and civil rights, subject to the restriction in the Proposition indicated, as can properly be said to have a local position, or situs, within the province. It is important to direct attention to this point because there is some authority in the cases in the Ontario Courts for the view that the maxim *mobilia personam sequuntur*, or in its quainter form, *mobilia ossibus inhœrent*, in some way applies to this matter of legislative power; and that the provincial legislature may not have jurisdiction under the clause in question over personal or moveable property or over civil rights, though situated within the province, if the owner of them be domiciled in another province, or abroad.[1]

What are property and civil rights 'in the province'?

limits of the State. The legislature of one State cannot make laws by which people outside the State must govern their actions, except as they may have occasion to resort to the remedies which the State provides, or to deal with property situated within the State": 6th ed. p. 149. Section 121 of the British North America Act, which provides that 'all articles of the growth, produce, and manufacture of any one of the provinces shall from and after the Union, be admitted free into each of the other provinces', is obviously, as it would seem, *alio intuitu*, and aimed against inter-provincial tariffs. It may be here noted that in the course of the argument on the Liquor Prohibition Appeal, 1895, Lord Watson is reported as remarking:— "The provincial legislature can only deal with that which is really a matter of civil right. They cannot propose, for instance, to deal with bankruptcy": Printed report, at p. 151. Provincial legislatures cannot deal with bankruptcy because this is exclusively a Dominion subject, under No. 21 of section 91; but the above words would imply that, apart from this, bankruptcy legislation is not properly speaking legislation in relation to civil rights.

Sect. 121, B.N.A. Act.

'Civil rights.'

[1] Thus in the Goodhue case, 19 Gr. 366, 1 Cart. 560, (1873), already referred to *supra* p. 281, where a testator left property in Ontario in trust for such of his children and grandchildren as should be living at the death of his widow, and some of the grandchildren were domiciled in England, Strong, V. C., held that as the right of the children under the will was in no way different from any ordinary legal debt as regards the question of locality, and as the locality of a debt is at the domicil of the creditor, therefore, it was *ultra vires* of the provincial legislature to extinguish by statute the rights of these grandchildren in the trust fund created by the will, though under No. 13 of section 92, it had full power to pass private Acts of parliament affecting private property "in all cases where the property and rights sought to be

Queston of domicil.

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Now these maxims certainly can, in themselves, afford no explanation or reason why they should apply to restrict legislative power.[1] As Mr. Dicey very clearly puts it: "The maxim *mobilia sequuntur personam*, being merely a short form of stating the fact that moveables are for some purposes treated, whatever their actual situation, as subject to the law of their owner's domicil, cannot serve as an explanation of the reason why in any particular case they are so treated. The general statement of a fact cannot,

Mobilia sequuntur personam.

affected are in the province, to the same unlimited extent that the Imperial parliament have in the United Kingdom": 19 Gr. at p. 452, 1 Cart. at pp. 573-4. He cites Tully *v.* The Principal Officers of Her Majesty's Ordnance, 5 U.C.R. 6, (1847), referred to *supra* p. 333, n. 5, *q. v.* Many of the other judges in the case do not refer at all to this point, holding as they did that on the proper construction of the statute it did not bind the interest of the grandchildren. Draper, C. J., held the Act *intra vires*, and that it bound the interest of the grandchildren, but does not refer specifically to this question of domicil; while Spragge, C., expresses general concurrence with Draper, C. J., but says that he had come to a less decided opinion upon the question of domicil than upon any other question in the case, but was inclined to think that it was the domicil of the trustee which must govern. Again in Jones *v.* The Canada Central R. W. Co., 46 U. C. R. 250, 1 Cart. 777, (1881), a case referred to *supra* pp. 461-2, *q. v.*, Osler, J., certainly seems to countenance the idea that the domicil of the owner of a debenture might determine whether the provincial legislature had jurisdiction in relation to it under No. 13 of sect. 92. As to the situs of debts, however, see *infra* pp. 759, n. 1, 760, n. In Smiles *v.* Belford, 1 O.A.R. at p. 440, (1876-7), it appears from the Reasons against appeal, that the point was taken that the Imperial copyright of the respondent being "personalty situate in England could not be affected by colonial legislation either before or since Confederation"; but the case went off on a different point, and this point so raised is not dealt with in any of the judgments in the case. See *supra* pp. 213-6. See also Clement's Law of the Canadian Constitution, at p. 463.

Question of domicil.

[1] They are maxims of what is generally known as Private International Law, or what Professor Holland more accurately describes as the law governing the "extra-territorial recognition of rights": Jurisprudence, 7th ed., p. 370. Whatever names are given to this branch of the law, they "are nothing more than convenient marks by which to denote the rules maintained by the Courts of a given country, as to the selection of the system of law which is to be applied to the decision of cases that contain, or may contain, some foreign element, and also the rules maintained by the Courts of a given country, as to the limits of the jurisdiction to be exercised by its own Courts as a whole, or by foreign Courts": Dicey on the Conflict of Laws, at p. 15. See, generally, *ibid.* pp. 12-15. See also, as to the application of the maxims in question to the law of England: Rattigan's Private International Law, pp. 80-4.

Private International law.

that is to say, explain part of the fact which it states."[1] And it is submitted with confidence that these maxims can in no way control or restrict the power of the provincial legislatures over an area and subject matter, over which, apart from these maxims, they would have jurisdiction; and that their power over property and civil rights in the province under No. 13 of section 92, (subject to the restriction in the import of those terms rendered necessary to allow scope for the other provisions of the British North America Act[2]), can have "no practical limit except the lack of executive power to enforce their enactments."[3] In other words, if 'property and civil rights' have such a local position in the province that the legislative arm can reach them, the provincial legislature has, subject as aforesaid, jurisdiction over them under the clause in question, no matter where the domicil of the owner of them may be.[4]

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Property and civil rights 'in the province.'

[1] Conflict of Laws, p. 787. "These maxims," says Mr. Dicey in another place, referring to the two maxims we are discussing, "as modified by statutory enactments, are based upon two considerations: the first is that property, so far as it consists of tangible things, must in general be held situate at the place where at a given moment it actually lies: the second is, that property may in some instances, and especially where it consists of debts and choses in action, be held to be situate at the place where it can be effectively dealt with. From these two considerations flows the following general maxim, viz., that whilst lands and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or in other words debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable, or can be enforced": *ibid.* pp. 318-9.

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[2] See *supra* pp. 754-5.

[3] See *supra* pp. 245-6.

[4] There is some analogy in this contention, and in the view thus suggested of the power of the provincial legislatures, to the rule in regard to the jurisdiction of Courts in England in respect to grants of probate and administration. "The fiction," says Mr. Dicey, "embodied in the often misleading maxim *mobilia sequuntur personam*, under which the moveables of a deceased person are for some purposes regarded as situate in the country where he has his domicil at the time of his death, has no application to the local situation of personal property as regards the jurisdiction of the Court to make a grant": Conflict

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And this view of the matter gains support from the judgment of the Privy Council in Dobie *v.* The Temporalities Board,[1] a case already referred to at some length,[2] and the judgment in which, as has already been stated, has suggested the leading Prop-

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of Laws, pp. 322-3. "The Court has jurisdiction to make a grant in respect of the personal property of a deceased person, if any personal property of the deceased either is locally situate in England at the time of his death, or has become locally situate in England at any time since his death, and not otherwise. The locality of a deceased's personal property under this rule is not affected by his domicil at the time of his death": *ibid.* p. 316. And in determining the local situation of debts or choses in action for the purposes of No. 13 of section 92 of the British North America Act, the cases on the subject of where the Courts of probate have jurisdiction may prove of assistance. Cf. the passage cited from Dicey, *supra* p. 759, n. 1; and with what he there says, *cf.* his statement at p. 321 of the same work, that "a share in a partnership business is to be held situate, not where the surviving partners reside but where the business is carried on"; as to which see, also, per Burton,

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J. A., in Nickle v. Douglas, 37 U.C. R. at pp. 61-2, (1875); per Patterson, J. A., S. C., *ibid.* at p. 71. And as to the situs of debts and choses of action, see Dicey *ibid.* at pp. 319-20, 533. Mr Munro, in his Constitution of Canada, (Cambridge University Press, 1889), at p. 248, erroneously refers to Nickle *v.* Douglas, 35 U. C. R. 126, 37 U.C.R. 51, as though it was a decision upon the point of provincial legislative power under No. 13 of section 92, over a debt belonging to a person domiciled out of the province. As a fact what it decided was that a person domiciled in Kingston, in Ontario, should not be assessed upon stock owned by him in the Merchants Bank, which had its head office in Montreal, inasmuch as such stock was not property in the province within the meaning of the Ontario Assessment Act. However the words of Wilson, J., in that case (35 U.C.R. at p. 145) may be noted in

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connection with the subject under discussion: "A general maxim such as *mobilia sequuntur personam* may be a good general guide; but it is certain it cannot be depended upon to its full extent when a statute says that personal property owned out of this province shall not be taxed." He also says: "The fact that it," (*sc.* the stock in question), "may be transferred at a branch office of the company if the directors so appoint, is a provision made for the convenience of the shareholders, and does not change the locality of the stock itself." The principle of Nickle *v.* Douglas was followed in The Corporation of the City of Brantford *v.* The Ontario Investment Company Co., 15 O.-A. R. 605, (1888).

[1] 7 App. Cas. 136, 1 Cart. 351, (1882).

[2] *Supra* pp. 366-8, *q. v.* In their recent judgment in respect to the Liquor Prohibition Appeal, 1895, [1896] A. C. at pp. 366-7, the Privy Council refer to the Dobie case and say:—"In that case the legislature of Quebec had repealed a statute continued in force after the Union by section 129," (*sc.* of the British North America Act), "which had this peculiarity that its provisions applied both to Quebec and to Ontario, and were incapable of being severed so as to make them applicable to one of these provinces only. Their lordships held that it was beyond the authority of the legislature of Quebec to repeal statutory enactments which affected both Quebec and Ontario.'

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position. There the validity of a Quebec Act, 38 Vict. c. 64, was in question, which purported to alter and amend an Act of the old province of Canada, 22 Vict., c. 66, incorporating a Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland; and after making the remarks noted in the first half of p. 367 *supra*, *q. v.*, their lordships say: "The Quebec Act of 1875 does not, as has already been pointed out, deal directly with property or contracts affecting property, but with the civil rights of a corporation, and of individuals, present or future, for whose benefit the corporation was created and exists. If these rights and interests were capable of division according to their local position in Ontario and Quebec respectively, the legislature of each province would have power to deal with them so far as situate within the limits of its authority.[1] . . . The corporation and the corporate trust, the matters to which its," (*sc.* the Quebec Act's in question), "provisions relate, are in reality not divisible according to the limits of provincial authority. . . The legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual corporators in that province. In addition to that, the fund administered by the corporate Board, under the Act of 1858, is held in perpetuity for the benefit of the ministers and members of a Church having its local situation in both provinces, and the proportion of the fund and its revenues falling to either province is uncertain and fluctuating, so that it would be impossible for the legisla-

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Meaning of 'property and civil rights *in the province.*'

[1] This seems to dispose of the sweeping assertion of Ramsay, J., in the Court below (3 L. N. at p. 251, 1 Cart. at pp. 383-4), that a provincial Act which disposes of the property of a corporation created by a federal law is unconstitutional. See, however, *infra* pp. 762-5.

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ture of Quebec to appropriate a definite share of the corporate funds to their own province without trenching on the rights of the corporation in Ontario. These observations regarding Class 13 apply with equal force to the argument of the respondents founded on Classes 7 and 11. Even assuming that the Temporalities Fund might be correctly described as a 'charity' or as an 'eleemosynary institution,' it is not in any sense established, maintained or managed in or for the province of Quebec; and if the Board incorporated by the Act of 1858, could be held to be a 'company' within the meaning of Class 11, its objects are certainly not provincial."[1]

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Assuming, then, that the maxim *mobilia personam sequuntur* has no application to this matter of legislative power, it is submitted, also, that if a person domiciled in Ontario owns property in Quebec, not only is his property, though it may be personal and moveable, to be deemed to be in Quebec within the meaning of No. 13 of section 92, but his right to that property is also a 'civil right' in Quebec within the meaning of that clause. But it must be admitted that if this be so, certain words of the Privy Council in Dobie *v.* The Temporalities Board,[2] are puzzling. After referring to the contention raised that the legislature of Quebec had power

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[1] The result of this decision was the passage in 1882 of a Dominion Act, 45 Vict. c. 124, to amend the Act of the province of Canada, 22 Vict. c. 66. See also 45 Vict. c. 123, and 125, and Bourinot's Parliamentary Procedure, 1st ed., p. 90. In the Court below in this case, 3 L. N. at p. 253, 1 Cart. at p. 385, McCord, J., says that the corporation in question, created by 22 Vict. c. 66, "being created for two provinces, and applicable to them both, it can only be altered by a parliament having power to legislate for these two provinces The corporation is not a mere accessory of the property which it has to administer, and though the provincial legislature may control 'the property' within its limits, and even the 'rights' of the corporation in connection with that property, yet it cannot alter the corporation itself."

[2] 7 App. Cas. at p. 151, 1 Cart. at p. 370, (1882).

to pass the Act there called in question, because the domicil or principal office of the Temporalities Board was in Montreal, and its funds were held and invested within the province of Quebec, they say: "The domicil of the corporation is merely forensic, and cannot alter its statutory constitution as a Board in and for the province of Upper and Lower Canada. Neither can the accident of its funds being invested in Quebec give the legislature of that province authority to change the constitution of a corporation with which it would otherwise have no right to interfere. When funds belonging to a corporation in Ontario are so situated or invested in the province of Quebec, the legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorized by sub-section 2 of section 92, or may impose conditions upon the transfer or realization of such funds; but that the Quebec legislature shall have power also to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867."

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Property of non-resident owner.

Now it certainly seems clear that either this shows the view above taken to be incorrect, and that where the owner of property in one province is a resident of another province, the former province cannot legislate upon the property under No. 13 of section 92 of the British North America Act; or that there is a distinction between the case of an individual and his property, and the case of a corporation belonging to one province and owning property in another; or that the power over property and civil rights in the province would not authorize confiscation for provincial purposes, which one may venture to say with great confidence is not intended[1]; or,

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[1] See Proposition 17 and the notes thereto.

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lastly, that the words must be read as having reference to such legislation as was then before the Board, where, however, the Quebec legislature did much more than merely confiscate,—or rather divert,—the funds in Quebec of the corporation there in question, since it assumed as their lordships point out[1] to interfere directly with the constitution and privileges of the corporation,—to destroy the old corporation and create a new one,—although it had been incorporated by an Act of the old province of Canada, and had its corporate existence and corporate rights in the province of Ontario as well as in the province of Quebec.[2] In the humble opinion of the writer the last explanation of the passage is the correct one, and as far as constitutional power goes, a provincial legislature could under No. 13 of section 92, confiscate any property, whether of a corporation or an individual, situate within the limits of the province, excepting indeed the public property of the Dominion, which by No. 1 of section 91 is placed under the exclusive jurisdiction of the Dominion parliament,[3] or property which belongs to a Dominion corporation with a Dominion object, and the control of which is essential to prevent such Dominion object being defeated, for example, the track of a Dominion railway. The case of an individual has already been dealt with, and it is submitted there is no distinction to be drawn so far as the mere ownership of property is concerned, in the case of a corporation,

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Powers over property of non-resident owner.

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[1] 7 App. Cas. at p. 149, 1 Cart. at p. 367.

[2] See the words quoted from the judgment *supra* at p. 314.

[3] See Proposition 54, and pp. 590-6.

[4] See Proposition 37 and the notes thereto, and *supra* pp. 594-6, 622-3, 625-6.

for the property of a corporation might be confiscated without necessarily affecting its constitution or status as a corporation.[1] Prop. 68

In Cowan *v.* Wright,[2] Blake, V.C., held *intra vires* the Ontario Act 38 Vict. c. 75, which was passed for a like general purpose as the Quebec Act in question in the Dobie case, namely to effectuate the union of the four different Presbyterian Churches in Canada.[3] Section 1 of the Act provided: "As soon as the union takes place, all property, real or personal, within the province of Ontario now belonging to or held in trust for or to the use of any congregation in connection or communion with any of the said Churches, shall thenceforth be held, used and administered for the benefit of the same congregation in connection or communion with the united body under the name of The Presbyterian Church in Canada"; and treating the Act merely as one dealing with the property in Ontario of the various bodies "and the civil rights pertaining thereto," Blake, V.C., says[4]: "Four bodies of Christians in the Dominion desire to unite; they enter into an agreement to that effect; some of them possess property in the province of Ontario; they express to the legislative body of the province the desire for union, and ask that the property belonging to them respectively in that province, may be held and administered for the benefit of the

Provincial Act making property of different congregations that of the United Church.

[1] See also the words of McCord, J. *supra* p. 762, n 1.

[2] 23 Gr. 416, (1876).

[3] However, no such question arose in Cowan *v.* Wright, as arose in the subsequent case of Dobie *v.* the Temporalities Board, (*supra* pp. 366-8), of legislative power to amend a statutory charter of the old province of Canada. What was affected in Cowan *v.* Wright, was the beneficial ownership by certain congregations in Ontario of certain property in Ontario.

[4] 23 Gr. at p. 625. None of the four bodies referred to were wholly domiciled in Ontario.

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united body; the legislature had the right to take from one body in Ontario the property belonging to it situate in that province, and to give it to another, and having that power it surely could say to those asking for such legislation, let the property at present belonging to these distinct Churches be in the future held by that which will then represent them,—a united body in place of divided Churches." At the same time the learned judge of course does not at all dissent from the contention that so far as the Act in question dealt, or professed to deal with property outside Ontario, it was *ultra vires*; but he says as to this, (at p. 626): "If the legislature of Ontario has the power to pass the property in this province of the four bodies to the united body, and it passes an Act sufficient for that purpose, I do not think it is invalidated because it may include in such properties a piece of land situate without its jurisdiction, and with which it cannot effectually deal." However, the properties actually in question in Cowan *v.* Wright belonged, as the report shews, to particular congregations in Ontario, not to the Church bodies as corporate wholes, so that the case is not any authority on the subject of legislative power over property in one province of corporations belonging to another province.

Act valid as to property in province, invalid as to property outside.

Returning to the general question of the true import of the words 'property and civil rights in the province,' in No. 13 of section 92, two cases remain to be referred to. The first is *re* Windsor and Annapolis R. W. Co.[1] where the majority of the Court held that the property and civil rights of a railway, which though authorized to extend beyond the province, and connect with lands without the

[1] 4 R. & G. at pp. 322-3, 3 Cart. at p. 399, (1883).

province, yet had as a matter of fact not done so, but operated wholly within the province, were within the jurisdiction of the provincial legislature, no declaration having been made under No. 10 of section 92 of the British North America Act that the railway was a work for the general advantage of Canada[1], and this though all or nearly all the shareholders and creditors were outside the province. And the second case is Clarkson *v.* The Ontario Bank,[2] where, referring to the Ontario Act respecting assignments for the benefit of creditors, which he held, erroneously as the Privy Council subsequently decided,[3] to be *ultra vires* as relating to bankruptcy and insolvency, Osler, J., said: "This Act is a public Act of a general character. It purports to deal with the estates of all insolvent debtors in the province who make an assignment, in other words, who voluntarily place their estates in liquidation, and prescribes to whom and in what manner they shall make such assignment. It directly affects the rights of all their creditors whether in this or the other provinces or elsewhere. So far, therefore, as it controls the rights of extra-provincial creditors, it is not confined to dealing with property and civil rights in the province, although that, as I held in Jones *v.* The Canada Central R. W. Co.,[4] may not be an objection in the case of creditors under an Act of a purely private or local character." But, it is submitted, the Act referred to only controls the

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Provincial Act affecting foreign creditors.

[1] As to such declarations, see *supra* p. 603, n. 2.

[2] 15 O. A. R. at p. 190, 4 Cart. at p. 527, a case decided with those of Edgar *v.* The Central Bank of Canada, Kennedy *v.* Freeman, and Hunter *v.* Drummond, all raising the same constitutional question.

[3] Attorney-General of Ontario *v.* Attorney-General of Canada, (1894) A. C. 189.

[4] 46 U. C. R. 250, 1 Cart. 777, (1881). As to this case see *supra* pp. 461-2.

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rights of extra-provincial creditors so far as such creditors seek payment of their debts against the property of an insolvent person within the province; and it seems quite consistent with principle that so far as outside creditors seek their remedy within the province, they are subject to the law of the province.[1]

Provincial autonomy.

In conclusion, reference may be made to the words of Dorion, C. J., in Bank of Toronto *v.* Lambe[2]: "Every provision of the British North America Act shews that the object of the promoters of the measure was to place each province in a state of perfect independence as regards each other, to establish the utmost freedom of intercourse and commercial relations between them, to exclude from the legisla-

Privy Council judgment in Ontario Assignments for Creditors' Case.

[1] Cf. *supra* pp. 328-9. The Privy Council in their judgment just referred to, (*supra* p. 767), although the constitutional validity of the provision whereby executions not completely satisfied by payment were postponed to an assignment for creditors under the Act was alone called in question, yet deal with the Act as whole, as they were urged to do upon the argument, sufficiently to show very clearly that it must be considered *intra vires* throughout. They do not discuss the point that the effect of it extends to extra-provincial creditors, but with reference to the above provision they say, [1894] A. C. at p. 198: "Now there can be no doubt that the effect to be given to judgments, and executions, and the manner and extent to which they may be made available for the recovery of debts, are *primâ facie* within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament." The Minister of Justice objected, as might be expected, to a provincial Act authorizing the sale, by the Attorney-General as administrator, of real estate situate outside the province of intestates dying without known relations in the province: Hodgins' Provincial Legislation, 2nd ed., pp. 151, 156-7. A case under No. 13 of section 92 of the British North America Act which has not been noticed before in this work, and may be mentioned here, is Gower *v.* Joyner, 32 C. L. J. 492, (1896), 17 C. L. T. 298, where the Supreme Court of the North-West Territories decided that an ordinance enacting that for ill-usage, non-payment of wages, or improper dismissal of a servant by his master, a justice of the peace might order such master to pay the servant one month's wages in addition to arrears and costs, and in default imprisonment for a month, was *intra vires* of the Legislative Assembly under this clause and No. 14, the administration of justice, Rouleau, J., dissenting.

[2] M. L. R. 1 Q. B. at p. 146, 4 Cart. at pp. 42-3, (1885), *sub nom.* The North British and Mercantile Fire and Life Insurance Co. *v.* Lambe.

tive authority of the provinces all regulations as to trade and commerce, customs and excise, navigation and shipping, banks, bankruptcy and insolvency,—in fact every subject which might give occasion to an interference by one province directly or indirectly which would affect the interests of the other provinces." However, the decision of the Privy Council in the latter case[1] shews him to be in error in the conclusion he proceeds to draw, that the Quebec Act in question in that case, taxing monetary institutions incorporated and domiciled in other provinces, and whose stock was held by people residing out of Quebec, was *ultra vires;* and it also shews that he went too far in saying in The Attorney-General of Quebec *v.* The Attorney-General of the Dominion[2] that: "the provincial legislatures exercise their authority over matters affecting the inhabitants of their respective provinces only.[3]

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Provincial tax on corporations belonging to and whose stock is held in other provinces.

[1] 12 App. Cas. 575, 4 Cart. 7, (1887).

[2] 2 Q. L. R. at p. 237, 3 Cart. at p. 101.

[3] In Bank of Toronto *v.* Lambe, 12 App. Cas. at pp. 584-5, 4 Cart. at pp. 19-20, the Privy Council say: "The next question is whether the tax is taxation within the province. It is urged that the bank is a Toronto corporation, having its domicil there, and having its capital placed there; that the tax is on the capital of the bank; that it must therefore fall on a person or persons, or on a property, not within Quebec. The answer to this argument is that No. 2 of section 92 of the British North America Act, does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any persons found within the province may be legally taxed there if taxed directly. 'This bank," (sc. the Bank of Toronto), "is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the bank, any more than its profits. The bank itself is directly ordered to pay a sum of money." And so in the Court below, Tessier, J., had said: "There are some shareholders residing out of the province in England, in the United States. That matters nothing. There is only one moral and legal being in which all the shareholders are united, no matter where they reside. For example, suppose the Federal parliament had imposed the same tax, which is here in question, on the banks, would these institutions be able to avoid paying these taxes by alleging that part of their shareholders live in England or elsewhere, and that part of their capital is employed in one of their offices established in England or in the United States? Evidently this objection would be rejected. Why should it not be

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when it is a question as to the same tax imposed by the legislature of Quebec?:" M. L. R. 1 Q. B. at p. 166, 4 Cart. at pp. 59-60. Cf. per Baby, J., S. C., M. L. R. 1 Q. B. at p. 196, 4 Cart. at p. 87-8; per Ramsay, J., S.C., M. L. R. 1 Q. B. at p. 179, 4 Cart. at pp. 71-2. Cross, J. observes,(S.C., M. L. R. 1 Q. B. at p. 158, 4 Cart. at p. 53):—"The principle of Confederation necessarily implied that one province would not interfere with the taxable subjects or property of another province; hence the qualifying words 'within the province' in sub-section 2 of section 92 include this limitation, which would have been implied from the circumstances, had even this express qualification been omitted"; but he erroneously held the tax in question to be on the paid up capital of the bank, "whose situs is without the province," whereas, as we have seen the Privy Council hold it was not on the capital at all. Cf. also per Burton, J. A., in Nickle *v.* Douglas, 37 O. A. R. at p. 62, (1875). In respect to what may perhaps be called the converse case to that which came up in Bank of Toronto *v.* Lambe, namely that of taxing persons in a province in respect to income derived wholly or partially from without the province, Hagarty, C. J., in Leprohon *v.* The City of Ottawa, 2 O.A.R. at p. 534, 1 Cart. at p. 605, (1878), with whom Patterson, J. A., would seem to agree, (S. C. 2 O. A. R. at p. 567, 1 Cart. at p. 643), intimates the view that 'direct taxation within the province' in No. 2 of section 92 cannot be legitimately extended to authorize this. But just as Burton, J. A. remarks in Nickle *v.* Douglas, 37 O. A. R. at p. 62, that it is "competent to the legislature having jurisdiction over the person to tax his personal property wherever situate,"—so it is submitted, it is competent for it to tax his personal property whencesoever derived. And as to Leprohon *v.* The City of Ottawa, see *supra* pp. 671-6.

Taxing income derived from extra-provincial sources.

APPENDICES.

APPENDIX A.

In the earlier pages of this book, which has had to be printed off in short sections as the notes to the various Propositions were completed, several references will be found to Appendix A. It was at that time in contemplation to treat separately in this Appendix the subject of legislative power in special reference to the trade in intoxicating liquors, which has given rise to so many questions in the Courts. As the work progressed, however, it was found more convenient to embody the whole of this matter in appropriate places in the text, and, under the circumstances, it will be sufficient to indicate the various passages where it is contained.

Legislative power in respect to the liquor trade.

As to provincial power under No. 9 of section 92 of the British North America Act, to legislate in relation to shop, saloon, tavern, auctioneer and other licenses, see pages 27, n. 1, and 723-6.

As to power to regulate and power to prohibit the sale, manufacture, or importation of intoxicating liquors, see pages 393-411, 653-7.

As to the distinction between wholesale and retail dealing, see pages 726-30.

[See also the General Index, *sub voc.* 'Canada Temperance Act, 'Licenses,' 'Liquor Traffic and Legislation,' 'Prohibitory Legislation,' and other appropriate headings, and an Article on Legislation and Liquor Dealers, in 32 C.L.J., 430.]

APPENDIX B.

Sections of the British North America Act, 1867, specially relating to the distribution of legislative powers.

VI.—DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

Legislative Authority of Parliament of Canada.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The Raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country, or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, Subjects of exclusive Provincial Legislation.

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices, and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province, and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings, other than such as are of the following Classes:

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

b. Lines of Steam Ships between the Province and any British or Foreign Country:

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.
12. Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of subjects enumerated in this Section.
16. Generally all matters of a merely local or private nature in the Province.

Education.

Legislation respecting Education.

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the provisions of this Section is not made, or in case any Decision of the Governor General in Council on any appeal under this Section is not duly executed by the proper Provincial Authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section, and of any Decision of the Governor General in Council under this Section.

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick.

Legislation for uniformity of laws in three Provinces.

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that behalf the Power of the Parliament of Canada to make Laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Agriculture and Immigration.

Concurrent powers of Legislation respecting Agriculture, etc.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

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